In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. 588.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ELECTRIC VACUUM CLEANER COMPANY, INC.,
INTERNATIONAL MOLDERS' UNION OF NORTH AMERICA, LOCAL NO. 430,
PATTERNMAKERS' ASSOCIATION OF CLEVELAND AND VICINITY,
INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO. 54,
METAL POLISHERS' INTERNATIONAL UNION, LOCAL NO. 3, and
FEDERAL LABOR UNION NO. 18,907,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT, ELECTRIC VACUUM CLEANER COMPANY, INC.

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OPINIONS BELOW.

Reported as stated in brief for National Labor Relations Board.

JURISDICTION.

The decree of the Circuit Court of Appeals, the filing and granting of a writ of certiorari, the invoking of the jurisdiction of the Court under the Judicial Code and the National Labor Relations Act, and the pertinent provisions of the Act involved are stated in the brief for National Labor Relations Board and the Appendix thereto.

PROCEEDINGS BEFORE THE BOARD.

The statement of the proceedings in the petitioner's brief, pages 4-7, and Note 2, by reason of certain omissions is insufficient to properly present a question of law which this respondent will urge as Point IV *infra*, in the event that the decree of the lower court should be reversed.

Respondent therefore submits the necessary date references[1] and adds that its exceptions to the Board's

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[1] May 21, 1937—Complaint against respondent issued. (Tr. 20.)
May 28, 1937—Amended complaint filed. (Tr. 28.)
June 4, 1937—Respondent's answer filed. (Tr. 33.)
June 10, 1937—Union respondents given leave to intervene. (Tr. 44.)
June 10, 11, 15, 16, 17 and 18, 1937—Hearing before Trial Examiner.
Nov. 1, 1937—Proceedings transferred to and continued before the Board (Tr. 47), and no Trial Examiner report issued.
July 7, 1938—Board issued findings of fact, conclusions of law and order. (Tr. 48-70.)
July 16, 1938—Respondent's exceptions filed. (Tr. 71-75.)
Aug. 23, 1938—Exceptions overruled. (Tr. 79-80.)
Feb. 2, 1939—Respondent filed in Circuit Court of Appeals for the Sixth Circuit its petition to review Board's order. (See motion to dismiss.) (Tr. 219-221.)
Apr. 11, 1939—Board on its own motion vacated its findings, conclusions and order of July 7, 1938. (Tr. 82.)
Apr. 24, 1939—Board's motion to dismiss Respondent's petition in Circuit Court of Appeals filed (Tr. 219-221), *for the reason that no intermediate report was made by Trial Examiner.* (Tr. 222, Exhibit B.)
May 9, 1939—Board's motion granted and petition in Circuit Court of Appeals dismissed. (Tr. 223.)
June 21, 1939—Proposed findings, conclusions and order issued by Board (Tr. 84-137), to which exceptions were filed by respondents (Tr. 137-148), and an oral hearing on the exceptions was had in Washington.
Dec. 21, 1939—Board overruled exceptions, dismissed petition for investigation and certification of rep-

order issued July 7, 1938, among other things, contained the following:

> "Respondent excepts to the decision and order of the Board, and each and every part and paragraph thereof, upon the ground that *no intermediate report of the Trial Examiner was filed in these cases*, so that Respondent had no opportunity to object or except thereto before the making of said decision and order, and that Respondent was not in any manner advised before the making of said decision and order of the proposed nature or contents thereof, and therefore had no reasonable opportunity to know the same or to object or except thereto." (Tr. 71.) * * *
>
> "The Board, in failing to decide this case for *thirteen months* after trial, has by such unreasonable delay prejudiced Respondent's rights, in that in case of an affirmance of the order directing reinstatement of certain employees, Respondent will then be required to pay in back wages a sum greatly in excess of that which would have been payable had the decision been promptly rendered, and by reason thereof Respondent excepts thereto." (Tr. 75.) (Emphasis ours.)

Respondent's petition to review the Board's order, filed in the Circuit Court of Appeals for the Sixth Circuit, showed the overruling of its exceptions which included an exception to the thirteen months delay, and the failure to file an intermediate report, and was dismissed on the Board's motion, for the reasons stated in Exhibit B (Tr. 222):

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resentatives, and entered the findings, conclusions and order here involved. (Tr. 150-217.)

Sept. 9, 1940—Board's petition for enforcement filed in the Circuit Court of Appeals for the Sixth Circuit. (Tr. 1-8.)

June 6, 1941—Circuit Court of Appeals' order was set aside and petition dismissed. (Tr. 866.)

Sept. 6, 1941—Petition for certiorari filed by the Board in this Court.

Oct. 20, 1941—Writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. (Tr. 876.)

"As you know, the Board, prior to the issuance of the Decision, Order and Direction of Election, in these cases, had adopted the policy of issuing proposed findings and a proposed order where no intermediate report was made by the trial examiner. Failure to do so in this instance was entirely inadvertent and is intended to be corrected by vacation of the Findings of Fact, Conclusions of Law, Order and Direction of Election. The Board also desires to give the entire case further consideration."

The Board's findings of fact, proposed conclusions of law, and proposed order, issued June 21, 1939, were excepted to by respondent and the exceptions included the following:

"The Board, in failing to decide this case for thirteen months after trial, and by delaying and preventing Respondent's attempt to review the action of the Board herein, and by re-opening the case upon its own motion, and thereafter submitting proposed findings of fact, conclusions of law, and order, in substance the same as the order vacated, has, by such unreasonable delay, prejudiced Respondent's rights, and in case the proposed findings of fact, conclusions of law, and order directing reinstatement of certain employees, become final, and are, thereafter affirmed, Respondent will be required to pay in back wages a sum greatly in excess of that which would have been payable had the decision been promptly rendered; by reason thereof Respondent excepts thereto." (Tr. 144-5.)

STATEMENT.

Respondent, Electric Vacuum Cleaner Company, Inc.'s involvement is solely by reason of a dispute for representation between the respondent unions affiliated with American Federation of Labor (hereinafter referred to as "A. F. of L. Affiliates") and a union chartered by United Electrical and Radio Workers of America, an organization affiliated with the Committee for Industrial Organization (hereinafter called "C. I. O."). There is no issue as to wages,

hours, or the ordinary grievances between employer and employee. (Tr. 285-724.) The case is purely a controversy between rival unions (Tr. 269), C. I. O. seeking to organize a plant under contract with A. F. of L. Affiliates. Respondent, the employer, was the innocent victim of circumstances, but was found by the Board to have been guilty of unfair labor practices, and was ordered to reinstate, with back pay, certain employees, which order the Court below set aside.

Respondent in this brief, when referring to "old employees" and "new employees," will use those designations as does the Board in its decision and petitioner in its brief. (Br. 5, Note 3.)

The making of the 1935 and 1936 contracts is not questioned by the Board, either as to majority representation, or as to the independence of the employees in negotiating such contracts, and the Court below so found. (Tr. 871.) As to supplementing the 1936 contract and making the 1937 contract, the Board fails to give due consideration to the very important fact that both this supplement and the third contract were negotiated during the term of the 1936 contract, and substantially three months before its expiration, at which time A. F. of L. Affiliates were the duly selected and exclusive bargaining representative, and that in their selection as such, there is no charge of interference, assistance or coercion by respondent.

As a part of both contracts there was in each instance an oral agreement, the terms of which (Tr. 263-4-5, 868) respondent communicated to its employees, notifying them at the same time that *any* employee who did anything to disturb the peaceful and friendly relationship under the contracts, would be considered as working against the best interests of the company and subject to discharge. (Tr. 291.) The oral agreements provided that any employees not members of the union as of June 23, 1935, were not required to join, but having joined, or if joining later, were

bound to continue their membership and in the future, all new employees would be compelled to join A. F. of L. Affiliates. Respondent and the Board disagree regarding the extent, interpretation and effect of the oral agreements, and the notice thereof, as will be more fully brought out in discussing the Board's so-called findings of fact. The Court below, however, held the oral agreements to be as respondent contends, and that notice was given. (Tr. 868, 871 and 872.)

When the 1935 contract was made, the A. F. of L. Affiliates represented, and had as members, six hundred ten (610), out of a total of eight hundred one (801), employees, and in 1936, when the second contract was made, all but 38 or seven hundred seventy-one (771) employees out of a total of eight hundred nine (809). This representation was evidenced by cards signed by the individual employees, stating the employees' union membership and authorizing A. F. of L. Affiliates to act as the signer's bargaining agent "for one year and thereafter," which cards were in the form of A. F. of L's. Exhibit 2 (Tr. 865)[2] and were checked against payroll by respondent. (Tr. 867.)

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[2] AUTHORIZATION FOR REPRESENTATION

"I, the undersigned, employee of the Electric Vacuum Cleaner Co. employed as Assembler hereby authorize my

(Craft—Mechanic, Helper, or Apprentice)

Craft Organization, Affiliated with the American Federation of Labor

	Membership Fee
Metal Polishers International Union	$3.50
International Association of Machinists	3.75 and $5.00
International Molders Union of North America	3.00 and 5.00
Pattern Makers Association	5.00 and 7.00
Federal Labor Union	2.50

to represent me and, in my behalf, to negotiate and conclude all agreements as to hours of labor, wages, and other employment conditions. I also authorize the Company to deduct, within thirty days, from wages, due, the prevailing initiation or reinstatement

During March of 1937, there was, for the first time, some discussion among certain employees (Tr. 380), relative to organizing a C. I. O. union in the plant, and about sixty (60) of respondent's employees met with a C. I. O. organizer, as a result of which meeting, C. I. O. application cards were signed. (Tr. 445.) On Thursday afternoon, March 18th, there was a sit-down strike in the machine shop, which was participated in by "around ninety or a hundred" employees in that department. (Tr. 310.) On Friday, March 19th, the sit-down strike terminated, respondent agreeing to reinstate any discharged employees (Tr. 268), and late on Saturday afternoon, March 20th (Tr. 270), A. F. of L. Affiliates, as bargaining agent for the employees, served upon respondent a notice demanding that the plant be temporarily closed, Board's Exhibit 15. (Tr. 856.) Upon receipt of that notice on Saturday, respondent met with A. F. of L. Affiliates, and upon being advised that, unless the plant closed, employee members of A. F. of L. Affiliates would refuse to work (Tr. 273), the plant was closed and remained closed until April 5th. About April 3rd, supplementing the existing contract, it was agreed that all employees must be union members, so that the 38 employees, up to that time exempted, were included. The plant reopened in accordance with notices published in the Cleveland papers, Board's Exhibit 8 (Tr. 852), the notices reciting, among other things, that only

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fee of the organization as indicated hereon and transmit same to the authorized representative of the organization.

The full power and authority to act for the undersigned as described herein supersedes any power or authority heretofore given to any person or organization to represent me, and shall remain in full force and effect for one year from date and thereafter, subject to thirty (30) days written notice of my desire to withdraw such power and authority to act for me in the matters referred to herein.

Signature of employee.
(Union Label)

employees who were members of the crafts under contract would be employed.

Upon reopening, the majority of the employees reported promptly for work and were immediately put to work, and the places of those failing to report were filled by new employees, which new employees were later let out as the old employees returned. Between April 5th and May 20th, 1937, during which period the supplemented 1936 contract was still in effect, as the result of various meetings with A. F. of L. Affiliates, a third contract, on substantially the same terms, was negotiated with A. F. of L. Affiliates, Board's Exhibit 10 (Tr. 853), which contract when signed was approved by the individual signatures of nine hundred ten (910), out of ten hundred thirty-two (1032) employees, the approval being endorsed on separate copies of the contract, in the form following:

> "I, the undersigned, having read the above agreement, hereby approve the making of same by the Unions, and during the term covered by said agreement, and any renewal thereof, while I am in the employ of Electric Vacuum Cleaner Company, Inc., I irrevocably designate the Unions as my exclusive bargaining agent, and agree to abide by all of the terms and conditions of said agreement." (Tr. 43.)

At the time of the hearing before the trial examiner, nine hundred sixty-four (964) of respondent's employees had given their written approval of this contract (Tr. 838), which contract in effect was the same as the supplemented 1936 contract, requiring membership by all employees in A. F. of L. Affiliates.

It is to the supplementing of the 1936 contract, and to the making of the third contract, and events in connection therewith, that the Board's order was directed.

ANALYSIS OF, AND COMMENTS UPON, THE BOARD'S FINDINGS OF FACT.

The facts in this case will very largely determine its disposition, and an analysis of the Board's so-called findings of fact (which contain no record references), and the respondent's comments thereon, together with its references to the transcript, will materially help to clear the differences between respondent and the Board as to the facts and findings.

Through such an analysis, the conclusiveness of the Board's findings, whether they are supported by substantial evidence, and the consideration to be given by the Board to testimony excepted to as hearsay or rumors, can be considered under this Honorable Court's holdings in *N. L. R. B. v. Columbian Enameling & Stamping Company*, 306 U. S. 292, 300; 83 L. ed. 660, at 665, and in *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229; 83 L. ed. 126, at 140.

Respondent regrets that such an analysis and comment may be tedious, but due to the form of the Board's findings, it is unavoidable.

In this connection, and before proceeding to consider the matters included in the so-called findings, respondent wishes to state, by way of an objection, that these findings in no way comply with the usual and accepted type adopted by the courts or prescribed by court procedure. *Norris, Jr. v. Jackson*, 9 Wall. 125; 19 L. ed. 608, 609; *Minchen v. Hart*, 72 Fed. 294; C. C. A. 8; *U. S. v. Sioux City Stock Yards Company*, 167 Fed. 126, 127; C. C. A. 8; *Corliss v. Pulaski County*, 116 Fed. 289 (C. C. A. 7).

Since the Wagner Act requires the entire transcript to be filed with the Court, it may well be argued that there is no more reason for the Board's findings to include evidentiary material, arguments, etc., than for any other finding to do so.

Respondent should be protected against having to defend itself against the injustice which may very easily result from the use of parts of the testimony of witnesses, with no accompanying citation to the record, references to briefs and to arguments, conclusions, repetitions, rumors and hearsay, such as are now included in the Board's findings. The Board's findings, conclusions and order occupy some sixty-eight pages of the transcript.

The only manner in which any analysis of and comments on the Board's findings can be presented, is by setting out in parallel columns, the findings in one column and the attempted analysis and comments in another, and this respondent has done in an Appendix attached to this brief.

The Board, in its brief under Questions Presented, Summary of Argument and Argument, proceeds upon the assumption that certain facts found by it are the facts disclosed and supported by substantial evidence, among the principal of which are:

(a) That the oral contracts of 1935 and 1936 were limited in their terms and applied only to new employees.

(b) That the oral contracts were secret and no notice of their terms was revealed to the employees.

In this connection

(a) It gives no consideration to and ignores the membership authorizations and powers of attorney signed by employees, members of A. F. of L. Affiliates, A. F. of L.'s Exhibit 2 (Tr. 865), and

(b) It does not give due consideration to the fact that the contracts complained of were negotiated *during the term* of a valid existing contract, with the exclusive representative of the employees, selected by an uncoerced majority.

The Board admits that the contracts of June 23, 1935 and July 6, 1936, were entered into upon the consideration that A. F. of L. Affiliates represented the majority of re-

spondent's employees; that such majority were members of the several unions; and that such majority was secured without the assistance of respondent; and does not claim that there were not outstanding and unwithdrawn on April 3, 1937, the authorized powers of attorney given when the second contract was made.

Respondent submits that its analysis and comments will develop the following, which it asks this Honorable Court to bear in mind, in the consideration of this case:

(a) That the terms of the oral agreements were as stated *supra*, pages 5 and 6, as will also be confirmed later when the making of the contracts is more fully presented. (Tr. 263-4-5, 750-51 and 811.)

(b) That employees had notice of the oral agreements clearly appears from the transcript references (Appendix, pages 51 and 54), and the Court below so found. (Tr. 868.) Notice was given through announcement to shop committees by Vice President Wilson, through foremen and through bulletin postings, as well as by A. F. of L. business agents who had access to the plant.

(c) That A. F. of L. Affiliates, in 1935 and 1936, were authorized to represent employees, was in each instance evidenced by individual powers of attorney, in the form shown in footnote 2, *supra*, page 6, and such authorizations were never withdrawn, and were compared by respondent against payroll lists as the 1935 and 1936 contracts were made. (Tr. 867.)

(d) That respondent, from the middle of March, 1937, to and including the making of the written closed shop agreement in May, had a valid contract, by the terms of which A. F. of L. Affiliates was the exclusive representative of all employees, selected as such by an uncoerced majority, the powers of attorney from which were then outstanding, and acted at the request of that representative.

Respondent's contentions with respect to the oral contracts, their terms, their application to old as well as new employees and notice thereof was sustained by the Court below. (Tr. 868, 871, 872 and 873.)

SUMMARY OF ARGUMENT.

The evidence establishes, and the Court below has found

(a) That new employees were required to join A. F. of L. after a two-week probationary period.

(b) That old employees, members of A. F. of L. Affiliates on June 23, 1935, or joining thereafter, were required to maintain their union membership.

(c) That old employees, not union members on June 23, 1935, were not required to join.

(d) That any employees were subject to discharge if they did anything to disturb respondent's friendly relations under its contract with A. F. of L. Affiliates.

(e) That the oral agreements were not secret, and the terms thereof were not kept from the knowledge of the employees.

(f) That the employees, by written cards, declared their union affiliation and authorized A. F. of L. Affiliates to bargain for them for a period of one year and thereafter, subject to withdrawal upon thirty days' written notice, which withdrawal privilege was not exercised.

(g) That the 1935-1936 contracts were negotiated with a labor organization not established, maintained or assisted by any unfair labor practices, and represented an uncoerced majority of the employees.

(h) That such relation existed at the time of the March difficulties and the supplementing of the 1936 contract and the making of the 1937 contract, and

(i) That the alleged unfair acts of the respondent were pursuant to its effort to live up to the terms

of its contract, and to the request of A. F. of L. Affiliates, the exclusive bargaining agent for *all* employees covered by such contracts when made.

Therefore, the Circuit Court of Appeals should be affirmed in its decree setting aside the Board's order eliminating the closed shop provision from the contract and requiring respondent to reinstate and provide back pay for some twenty-four (24) employees.

ARGUMENT.

Petitioner's brief, insofar as it has to do with construing the proviso in Section 8, Subsection 3 of the Act, is directed principally to the respondent unions, and to conserve the Court's time, this respondent will confine its consideration of that question principally to the facts, leaving the main discussion and presentation of the law to the other respondents.

POINT I.

THE 1936 CONTRACT, AS SUPPLEMENTED APRIL 3, 1937, AND THE CLOSED SHOP CONTRACT OF MAY 20, 1937, HAVING BEEN MADE DURING THE TERM OF A VALID CONTRACT WITH AN EXCLUSIVE REPRESENTATIVE SELECTED BY AN UNCOERCED MAJORITY, ARE LIKEWISE VALID.

The National Labor Relations Act seems clear and unambiguous in its defining of the conditions under which an employer may make a closed shop agreement with a labor organization. The restrictive interpretation contended for by petitioner, when considered on the facts in this case, places a limitation on the powers of an exclusive representative, which is contrary to the very purpose of the Act, for if industrial harmony is to obtain, a representative once selected and qualified should retain its powers during the full term of its appointment.

Consider the purpose of the Act.

> "• • • Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce, by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees," • • • (Section 1)

and as carrying out that purpose, Sections 7, 8 (1), 8 (3) and 9 (a).

These provisions, when read together, give employees, among other things, first, the right to bargain collectively, through representatives of their own choosing, the representative so chosen to be the exclusive representative of all employees; and second, a guarantee of these rights against employers' interference and discrimination in regard to membership in any labor organization, except that an employer may make an agreement with a labor organization (not established, maintained or assisted by an unfair labor practice) to require as a condition of employment, membership therein, *"if such labor organization is the representative of the employees as provided in Section 9 (a) in the appropriate collective bargaining unit covered by such agreement when made."*

Having in mind these provisions, what are the facts in the instant case?—In June of 1935, A. F. of L. Affiliates represented all but 191 of respondent's 799 employees, and in 1936, all but 38 of 809. This majority respondent demanded be established to its satisfaction as a consideration for its making the contracts, and this was done by submitting and checking cards, which disclosed not only the signer's membership in a craft union, but which also contained a power of attorney to A. F. of L. to act for the

signer for one year and thereafter, subject to a thirty-day revocation. The Board admits that in June of 1936, the time of making that contract, A. F. of L. Affiliates' majority of all but 38 of the employees, represented an uncoerced majority.

The oral agreement as made in 1936, contemplated, as has been stated before, that all employees, except the 38 who were not then members, were required to maintain their membership, any of the 38 who might join losing their exempt status, and new employees were required, after two weeks probation, to join. It was not, as the Board contends, a mere preferential shop with only new employees obligated to become members, but was practically a closed shop.

Accordingly, during the term of the contract, the union had the right to require those employees whom the Board found had been unlawfully solicited, to remain or become members, and further had the right to require their discharge for failure to join, which right the union exercised at a later date. If the discharges are considered to have taken place under the April amendment, that contract was valid, because at the time of its making, the A. F. of L. was assured of a majority of more than 90%, and no other group had made a majority claim. The only notice of any such claim had by respondent was the C. I. O. letter (Exhibit 11, Tr. 854), which respondent did not receive until April 5th, after the plant had reopened, and after agreeing to the April 3rd supplement. (Tr. 241 and 298.)

The Board does not deny that its decision and order would be unjustified if the oral agreement provided as respondents contend. What, then, did the uncontradicted facts show was the intention of the parties?

It is not disputed that both in 1935 and 1936, when the oral contracts were negotiated and renewed, the A. F. of L. had demanded a complete closed shop, and the evidence is also uncontradicted that respondent objected to a completely closed-shop contract *only* because such contract

would require certain old employees to join who had never belonged to any labor organization and who might not want to join any labor organization. (Tr. 750 and 811.) At the time of the negotiations there was no very detailed discussion of the obligation of employee-members to remain members, and the record, unfortunately, contains no testimony showing with any great degree of particularity what the understanding was in this respect. It is plain, however, that it was clearly assumed by and was the intention of the parties that present members would be required to remain members during the term of the contract (Tr. 871 and 873) and the parties distinctly so understood, and the employees were in substance so notified. That such was the case is obvious, as the unions were giving up the closed shop only as to employees not then members, and as the respondent's vice president stated, such employees were not, using his words, "compelled to join." (Tr. 265.) For the Board to find that the unions finally agreed that only new employees need become members is unrealistic and unreasonable in view of the fact that the only contention between the parties was as to the disposition of the old employees who had not joined.

It is further evidenced by the following undisputed portions of the testimony dealing with the subject of the intent of the oral agreement. Before setting forth this testimony it should again be pointed out that due perhaps to the very fact that it was assumed without discussion that employees who were members would remain members, the testimony is often confusing, but the meaning becomes clear upon reflection. For instance, when talking of the oral contract, the witnesses loosely refer to the employees who were not members at the time of the contract as "old employees," and, at other times, referred to all employees employed at the time of the contract as "old employees." When stating that under the oral agreement new employees were to become members and "old employees" did not have

"to join," obviously the parties meant by the term "old employees" the employees who never had joined, for the other "old" employees who were members already had joined and could not be required "to join." Further, if they were meant to be included within the term "old employees" as used above, the term "must remain members" could have been used instead of, or in addition to, the term "must join."

The only persons testifying concerning the scope and extent of the oral agreement were George Paulus, plant superintendent; R. B. Wilson, Vice-President and General Manager of respondent; Muehlhoffer, a union representative; and Ralph C. Gordon, union representative.

The testimony of George Paulus, plant superintendent, is as follows (Tr. 688):

"Q. In 1935, June, are you familiar with the contract that was made by the Company with various American Federation of Labor Unions?

A. Yes, sir.

Q. Will you tell us what that contract or agreement provided with reference to employees belonging to a union, if any?

A. It was a closed shop at that time.

Q. What do you mean by a closed shop?

A. A closed shop means that people that were working there—the new people coming in were to join the union within three weeks of the time they came there.

Q. How about employees that were with the company at the time this contract was made in June of 1935?

A. Those employees, the Union, as I understand it, tried to get those people to join the Union.

Q. There was no requirements that they join any union?

A. No, sir."

From this testimony it can be seen how the confusion, if any, arose as to which employees were not required to

join. All other witnesses, in referring to "old employees," referred to the fact that they "*could join,*" which would indicate, of course, that these employees previously were not members.

Muehlhoffer, a Union representative, testified that on the renewal of the verbal agreement "it was insisted again that some of the employees in that plant must come in to our organization." Obviously, here again we have a reference only to the old employees who never were members. He said, in substance, that when the 1935 contract was entered into, the organizations were asking for an entirely closed shop, the reason being that the polishers' union had already established that condition, but there were quite a few of the old men in the shop, in the other departments, that did not belong, and to require them to join might work a little hardship and "Mr. Tuteur, being a little chicken-hearted, feared to hurt these men in laying them off." (Tr. 811-12.)

The following uncontradicted testimony of R. B. Wilson, respondent's Vice-President and General Manager, illustrates the looseness with which the term "old employees" was used, and also indicates clearly and conclusively that only old employees who had not signed A. F. of L. membership cards at the time of either the 1935 or 1936 contracts were not compelled to join or remain affiliated with the A. F. of L. (Tr. 264-265):

> "Q. In your answer, you stipulated whereby you made certain provisions for such employees that did not become members of the majority; is that a fact?
>
> A. I am just a little hard of hearing. I did not hear the first part of your question.
>
> Q. I say when you signed this first agreement with the five A. F. of L. Unions, there was I am saying a minority group?
>
> A. Yes.
>
> Q. That did not sign with the majority, and there was some provision made for them; isn't that a fact?
>
> A. That's right.

Q. What was that provision?

A. To the effect that the *old employees* would not be required to *join* the union.

Q. Do I gather from your answer that the old employees did not join with the Federation?

A. *Old employees did.*

Q. But it is a fact that a distinct group of employees did not join with the majority?

A. I would not call them a group. I would say there were some employees in our plant that did not join. We did not think of them as a group and they were not a group, to the best of my knowledge.

Q. What was the attitude of the company on retaining those employees who did not sign as employees of the Electric Vacuum Cleaner Company?

A. They were permitted to continue with their jobs without discrimination.

Q. What do you mean by without discrimination? Was there any discrimination at the plant before this contract was signed?

A. No.

Q. Well, the company did not stop those employees who did not sign with any Federation or Local Union?

A. It was in no sense our business at that time. They were free agents, every one of them.

Q. And after the 1935 contract expired, you supplemented that by a new contract; is that right, Mr. Wilson?

A. Yes.

Q. And in 1936 the contract in substance was the same as the 1935 contract?

A. Yes.

Q. With the exception of foremen, or relatives of foremen, and the same provision and the same policies of the company as to such employees who were not members of any union was carried on during the period of 1936; is that right?

A. Except that new employees even from the period of the first contract were—the old employees were not compelled to *join* the union.

Q. New employees?

A. Yes.

Q. *But those employees that were then employees of your company in 1935 who were not members of any labor organization were not required to sign up with any labor organization in 1936 when the second contract was entered into; is that a fact?*

A. Right.

Q. And no discrimination was to be exercised by the company as to those employees?

A. You are right." (Emphasis ours.)

The foregoing testimony is uncontradicted, and the Board makes no attempt to explain it.

Finally, another portion of uncontradicted testimony by Wilson indicates quite conclusively that the substance of the oral agreement was that employees who were members of the A. F. of L. at the time of the contract, as well as new employees, were required to be members of the A. F. of L. (Tr. 291):

"Q. In other words, you stated at that time you had eight hundred and one employees and six hundred and ten from your information given you by the American Federation, signed up with these crafts, and the balance of approximately a hundred and ninety did not have any affiliations?

A. At the date of the signing.

Q. How was this notice given?

A. Verbally before the committee of employees, and posted on the bulletin board.

Q. Have you kept these posted on the bulletin board?

A. Kept them posted on the bulletin boards throughout the plant.

Q. Can you give us in substance what that notation said?

A. Yes; we informed our employees that we had entered into a contract with the various affiliated unions of the American Federation of Labor, having determined that the majority of the employees were members of those various organizations. *Having entered into such a contract, any person in our employ in the shop who did anything to disturb the peaceful*

and friendly relationship would be considered as working against the best interests of the company and as such were subject to discharge.

Q. Now, this contract that you entered into gave permission to the business representatives of these various Locals the right to enter in and upon the premises as they saw fit?

A. Yes." (Emphasis ours.)

The testimony of Ralph Gordon, union representative (Tr. 750-51) is similar to that of Wilson and emphasizes the fact that the only point of difference between the unions and respondent regarding the closed-shop issue was as to the 67 or 68 employees who did not want to belong to the union, and the union felt there was no use blocking all negotiations because of that difference alone. Gordon testified:

"A. That was the difference of not signing the agreement after the meeting on Thursday because the group wanted a strictly closed shop, and the management would not agree to it, and that was the dickering that we had forth and back, and finally the whole thing was that there was about sixty-seven or sixty-eight of all the employees who had not joined and we felt there was not any use of calling the plant closed until that was thrashed out. And we thought if we could not get these employees to join, then, of course, there was not any use of having them as members anyway."

The Keehl incident mentioned in the Board's decision (Tr. 163), as to the fact that the oral agreements required only new employees to become members is just as indicative that the oral agreement required old employees to be members, except those employed in 1935, who never were members.

Petitioner refers to the letter of Tuteur, respondent's president, to the Board's Regional Director in Cleveland, written June 12, 1936, more than a month before the 1936 contract was made, and long prior to any labor disturbance at the plant, in which letter the president refers to an oral contract and mentions only that new employees are obli-

gated to become members thereunder. This letter was written in confidence to the Board, and as an accommodation, and there being no duty on Tuteur's part to give the information, he was, no doubt, not as definite as he otherwise would have been. The fact that he mentioned only one aspect of the oral agreement can be explained by (1) as Muehlhoffer testified *supra,* page 18, "Tuteur being chickenhearted" would not require any old employees to join who were not then members, and knowing at the time of his letter that only a few were not union members, inadvertently failed to mention the understanding as to old employees, and (2) that he did not want generally known, to the trade and public, the company's contract, and he was on that account very sketchy in his statement.

The above constitutes all the evidence in the record on the question of the intent and purpose of the oral agreement. From this evidence—at best negative—the Board reached its conclusion that the oral contract required only new employees to join.

The decision of the Court below indicates quite strongly that it was the opinion of that Court as well, that the contracts extended much further than the Board concludes and were almost tantamount to a closed-shop.

> "The contracts were in the nature of closed shop agreements, for eventually, as old men dropped out, if the contracts were renewed a genuine closed shop would be established." (Tr. 871.)

Certainly, in referring to old members dropping out so as to create a genuine closed-shop contract, the Court must have been referring only to those old employees who never were members as being the only persons obligated to become or remain members. Otherwise, a genuine closed shop would not be achieved for two or three generations.

Finally, the Court specifically held that:

> "The Board, therefore, erred as to its order finding the respondent guilty of discrimination with reference

to 18 of the 24 employees named in the order because these 18 were members of A. F. of L. Affiliates, were bound by the contract until June 1937, *and were compelled to be in good union standing in order to continue in respondent's employ.*" (Tr. 873.)

All of the evidence bearing on the question of the scope and purpose of the oral contract has been set forth above, and that evidence is entirely insufficient to support the Board's conclusions. The Board can rely only on a negative—failure to specifically set forth the extent of the oral contract—while the positive evidence—both circumstantial and direct—indicates clearly and positively that the parties must have intended and had the semi-closed shop.

Respondent's making the contract on the consideration that it was exempting but 38 men from union membership, placed an obligation upon the individual employee union members, both under the contract and as signers of powers of attorney, to continue that relation, and inasmuch as respondent had, at its request, been shown and checked the individual powers of attorney, respondent did and was justified in relying upon the relation to continue.

The Board, in its brief page 42, note 29, in speaking of the membership agreement, concedes that by that agreement the members may have assumed an obligation to the union to remain members for a specified period, but that a breach of that membership, while, perhaps, subjecting the members to a claim for damages by the union, would not be a breach of the collective agreement with the employer. This might be true, if the membership agreement was nothing more than its name implied, but since it contains a power of attorney to the union, by virtue of which, as the member's attorney, the union negotiated a contract, and the employer accepted the contract on the assumption that the power of attorney was good for the term of the contract, then in the absence of a revocation of that power (and there was none in the instant case), the employee would be estopped to

deny the agent's continuing authority and would be bound by the acts of his attorney.

The petitioner, throughout this case, fails entirely to appreciate the importance and the significance of these powers of attorney. The respondent was not relying solely on the agent's selection by reason of being the representative of the uncoerced majority, but was likewise depending upon the authority vested in that representative by the individual powers of attorney.

The first contract having operated satisfactorily, a second contract was made for 1936-1937, upon substantially identical terms. The oral contract, as part of the second contract, was renewed. The unions again were required, in consideration of respondent's contract, to furnish proof that through their members they represented the majority of employees, and similar cards containing a power of attorney were again submitted and checked for all but 38 employees. In making the second contract, as well as the first, respondent is not charged with having assisted the unions, and there is no claim that the unions did not represent an uncoerced majority of the employees. So again, we have a legally established contractual relation for another year, with respondent being entitled to rely on that relation continuing for the term of the contract, and to act on that reliance.

Relations between respondent and its employees had been harmonious and undisturbed from the time of the making of the first contract in June of 1935, until March, 1937 (Tr. 285-724), at which time it developed that C. I. O. was in the plant, and an attempt was being made to organize the plant in the face of respondent's then standing contract with A. F. of L. Affiliates, and that such raid was in progress was called to the attention of respondent's vice-president, Wilson, by A. F. of L. Affiliates, the day before a sit-down strike occurred in one department:

"That meeting, on the morning of Thursday, March 18th, I believe was the date Mr. Muehlhoffer, Mr. Rhinehart and Mr. Newman came to my office representing the Polishers group, and advised me that there was some agitation in the machine shop, which was the first knowledge of any sort that I had had of any such agitation or disturbance. I was caught entirely flat-footed. I told them, in effect, that I considered them to be unduly alarmed, and everything that was said at that meeting had to do with allaying their alarm, and sending them back to work, and I told them that we would proceed to investigate the matter, and that was all that took place at that meeting." (Tr. 681-2.)[3]

What respondent did during the period complained of was at the request of A. F. of L. Affiliates, and was done in reliance that they then, and until the end of the term of the contract the following June, were the duly designated exclusive bargaining agent.

Under the foregoing facts, can it reasonably be claimed that, during the term of the contract, and at a time when the A. F. of L. Affiliates was the exclusive collective bargaining representative for all employees, respondent could not consent, as requested by that representative, to supplement an existing agreement, so as to require the few old employees not then union members to become union members, thus establishing, in effect, a substantially closed shop, and later, during the term of the supplemented contract,

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[3] The meeting concerning which Wilson was testifying, as above, is the same meeting to which the petitioner refers in its brief, in Note 12, at Page 17. In that note Wilson is quoted as saying "He was going to make them join the American Federation of Labor union, and if they don't he would fire one or two so the rest of them will join." An examination of the record will disclose that one Behrse said that Newman, who claimed to have been present at the meeting with Wilson, told him he heard Wilson make this statement. The statement is not only denied by Wilson (Tr. 681), but Behrse's testimony was accepted over respondent's objection that it was hearsay. Newman was not called by the Board.

make the May contract, which was a written contract, embodying practically the same terms as the 1936 agreement, written and oral, as supplemented April 3rd? *The employees had, since June of 1935, been asking for a closed shop, and the Board found that such a demand was presented when the first contract was made in 1935* (Tr. 160) *and was renewed in 1936.* (Tr. 161.) *Respondent was therefore then consenting to accept, as part of its contract, a provision which the bargaining representative had for two years been seeking to get. It was no new development.*

The following cases are cited, not as controlling upon this Court, but merely to indicate that the present policy of the Board, as it now interprets the Act, is not contrary in its general principles to the theory upon which this case was decided by the Court below.

In the Matter of J. E. Pearce Contracting and Stevedoring Company, Inc., and International Longshoremen and Warehousemen's Union, Local 2-5, decided February 29, 1940, and reported in 20 N. L. R. B. 1061, the headnote of which reads:

> "Stevedore Industry—Interference, Restraint, and Coercion: charges of, dismissed—Discrimination: employer's reliance upon a preferential-employment contract in awarding preference in employment to members of contracting union held valid despite transfer of allegiance by a substantial number of the members of the contracting union to another labor organization; disestablishment of contracting union by International and substitution of a new local in the place of the contracting union as a disciplinary measure against employees who transferred their allegiance, held not to dissipate the preferential-employment contract—Collective Bargaining; charges of refusal to bargain collectively dismissed—complaint; dismissed."

The contract in the cited case was made in September, 1937, the acts complained of occurred in July, 1938, and the contract was renewed in September, 1938. There was

no claim that when the contract was executed in September, 1937, the union was assisted by any unfair practices or that it did not represent a majority, and it was therefore held to come within the proviso of Section 8 (3) of the Act. The board in supporting its decision refers, among other cases, to *M. & M. Woodworking Company v. National Labor Relations Board,* 101 F. (2d) 938 (C. C. A. 9), and *In the Matter of Ansley Radio Corporation,* 18 N. L. R. B. 1028.

The following three cases, while they involve discharges for union activities, nevertheless very significantly consider the proviso in Section 8 (3) and the matter of notice of contracts, and on a basis favorable to respondent's contention: *In the Matter of Motor Products Corporation,* 34 N. L. R. B. No. 120; *In the Matter of Weirton Coal Company,* 34 N. L. R. B. No. 121; and *In the Matter of International Envelope Corporation,* 34 N. L. R. B. No. 122.

The cases relied upon by petitioner to establish the illegality of respondent's acts and of the contracts are distinguishable on the facts.

The Court below in its opinion considered *International Association of Machinists v. N. L. R. B.,* 311 U. S. 72, 85 L. ed. 50.

In *N. L. R. B. v. J. Greenebaum Tanning Company,* 110 F. (2d) 984 (C. C. A. 7) certiorari denied, 311 U. S. 662, the employer participated, to a certain extent, in the formation of a new association, a membership campaign being carried on in the presence of the company's foreman and on company time, and with management participation in the solicitation, which was not only prior to the contract but assisted in securing a majority.

The facts in *Warehousemen's Union v. N. L. R. B.,* 121 F. (2d) 84, 87, App. D. C., certiorari denied, clearly indicate that the issue decided was that the teamsters'

union did not represent a majority of the employees at the time the contract was made.

None of the foregoing three cases, as the respondent reads them, holds that under the fact situation in the instant case majority status and absence of assistance are independent conditions precedent to the validity of a closed-shop agreement, as the petitioner contends.

In *N. L. R. B. v. Waterman Steamship Corporation*, 309 U. S. 206, 84 L. ed. 704, the preferential contract provided "contract not to be construed to require the discharge of any employee who may not desire to join (I. S. U.)," and there was considerable doubt whether A. F. of L. represented the majority of employees at the time of the alleged unfair acts, there having been a waiver of right to rely on the preferential contract by filing a petition requesting an election. There were no authorization powers of attorney and no partial closed-shop agreements, as in the instant case.

The same is true in *South Atlantic Steamship Company v. N. L. R. B.*, 116 F. (2d) 480 (C. C. A. 5) certiorari denied, 313 U. S. 582, there being in that case great doubt as to the majority representation. There was likewise no closed-shop as to any employees, and as in the instant case, no unrevoked authorization powers of attorney.

In the instant case, the unrevoked powers of attorney secured without assistance by respondent, respondent's action being in furtherance of a valid contract and with the representatives of an uncoerced majority, and the contract in any event being closed-shop as to all but 38 employees, brings the case within the provisions of the Act and the contract and respondent's conduct in connection therewith are not condemned by the Act.

Petitioner, in its brief page 11, makes the statement "Concerning the presence of substantial evidence to support most of the Board's finding of fact, there is no dispute.

While the Court below concluded that the company had not violated the Act, its decision was not based on a holding that supporting evidence was lacking."

Respondent excepts emphatically to this statement. The Board based its decision on a contract, the terms and interpretation of which are not only contrary to what evidence shows, but are also contrary to the holding of the Court below. The same is true as to the powers of attorney which respondent insists, and the Court below found, are material to a determination of this case, but which the Board ignores.

The Court, with respect to the contract, held as shown *supra*, and with respect to the powers of attorney and their effect:

> "The legal conclusion made by the Board that the members of the A. F. of L., after the 1935 and 1936 contracts were executed, were free to abandon such membership at will, when considered in the light of the authorizations signed by the men and the total failure to file withdrawals in accordance therewith, is plainly erroneous. So far as the understanding of the parties illuminates the meaning of the obligation, it is that the men were bound for the period defined in the authorizations. There was no testimony to the contrary." (Tr. 871.)

> "At the time that some of the old employees called a C. I. O. organizer into the plant, all but 38 of the employees working when the 1936 contract was executed had signed written authorizations, as hereinbefore described. These authorizations, running for a term of one year and thereafter, could be withdrawn upon thirty days written notice; but the record presents no such withdrawal. The term of one year was reasonable and the authorizations were in every respect legal." (Tr. 872.)

The general and established principles of jurisprudence have not been swept aside by the provisions of the National Labor Relations Act, and the contracts in this

case are to be interpreted and controlled not by any special principles applicable to labor only, but by the general and established principles of law, and are entitled to the same construction and protection before the Board, as they would be before any other tribunal.

So, also, the powers of attorney, from the individual employees to the unions, demand full honor and recognition by the Board, and the Board is bound by their legal effect.

That the Board has applied its own principles of law is not open to serious doubt, when its statement with respect to the doctrine of notice and principal and agent is considered: "But in any event narrow common law concepts of principal and agent do not furnish a proper basis for limiting the protection of employees under the Act. * * * Whatever the rules of imputed knowledge at common law may be, it is reasonable to construe the proviso of Section 8 (3) as the Board did, * * *" (Br. 49) and this attempted justification is not upheld by the language quoted by the Board from the case of *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 80, 85 L. ed. 50, 56.

From June of 1935 to April, 1937, respondent had a valid partial closed-shop contract, which, on April 3rd, was not abandoned, but was orally supplemented so as to be substantially a closed-shop contract, and in May of 1937, was reduced to writing. The 1936 contract and supplement, and the May contract, were made with the *then* exclusive representative of all employees selected by an uncoerced majority, which representative was further fortified as such by the separate powers of attorney from each individual employee, who made up that majority; those powers of attorney were never withdrawn, and by virtue thereof, that majority of necessity continued so long as those powers were outstanding, namely, during all the times complained of.

The 1936 contract, which was a valid one, was likewise in effect at all the times complained of, and respondent's

cooperation was given, at the request of the then duly authorized representative of an uncoerced majority of employees, as well as the then exclusive representative of all employees, and did not contribute to or assist in establishing or maintaining the exclusive representative capacity of that representative or securing the amendment and third contract.

In the light of the purpose of the Act, and applying its provisions to a contract made under the foregoing conditions, the labor organization being as in Section 8 (3) required and the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement *when made*, the contract in the instant case meets the test and is valid.

POINT II.

RESPONDENT'S COOPERATION WITH A. F. OF L. AFFILIATES WAS PERMISSIBLE, AND WAS NOT ASSISTANCE SUCH AS IS CONDEMNED BY THE ACT.

If the reasoning of respondent in Point I is sound, then its conduct and cooperation with A. F. of L. Affiliates, at their request, was proper and harmless, inasmuch as A. F. of L. Affiliates without respondent's assistance was then and at all the times, during which respondent was charged with unfairness and coercion, the duly acoredited and exclusive bargaining representative for all employees, under Section 9 (a) of the Act.

As bearing on respondent's relations to its employees and conduct, it must be considered

(a) That respondent had no union preference until after the signing of the valid contract of 1936, which represented the choice of 85% of respondent's employees. (Tr. 874.) Under such conditions respondent was bound to prefer A. F. of L. Affiliates.

(b) That there was no wage or other dispute. (Tr. 724.)

(c) That respondent's relations with its employees, since June of 1935, had been harmonious. (Tr. 285.)

(d) That the first and only break in its continuous good relations with its employees from June of 1935 was by reason of differences between C. I. O. and A. F. of L. Affiliates, as to A. F. of L.'s representation contract and membership, as a result of which respondent's plant operations were disrupted and the contract under which the vast majority of its employees were working, and with the terms of which they were satisfied, was threatened, and

(e) That A. F. of L. Affiliates, by virtue of the unrevoked powers of attorney upon which respondent relied, as well as by a valid contract then in effect was then, and at all times during the period in question, the exclusive bargaining representative of respondent's employees. It was the exclusive bargaining agent of all employees selected by an uncoerced majority, which majority in March of 1937 was just as large as it had been in June of 1936. It was such representative when the alleged offending contracts were made.

The making and terms of the 1935 and 1936 contracts having been previously reviewed, the Court's consideration is directed to occurrences in March of 1937.

In March 1937, respondent's business had been increased to the extent that there were about one hundred more employees than in June of 1936, and this situation coming to the attention of the business agent of the Machinists' Union, he talked with Paulus, respondent's superintendent, who, on the union's request, called on some of the old and trusted employees to cooperate with him and with the representative of the Machinists' Union in signing up these new employees. (Tr. 689.) Paulus had no means of knowing whether the old employees upon whom he called were union men or not.

There is no testimony, except hearsay, and a few instances which are specifically denied by the persons charged

with having made them, that any of the old or the new employees for that matter, were threatened with the loss of their jobs if they did not join A. F. of L. Affiliates, until we come to the Ramsey case. The C. I. O. drive was then in full swing. Ramsey, at the request of A. F. of L. Affiliates, was probably discharged, but this discharge was not effective for any length of time, and he would have returned to work promptly without any loss of time had it not been for the sit-down strike. As it was, he returned to work when the plant reopened on the 5th of April, and has been with respondent ever since. There is no claim whatever that he suffered any loss of time by reason of his difficulty with the union representatives, and with this the Court below was in agreement. (Tr. 873.)

It is not clear whether or not a sit-down strike had occurred before or after Ramsey's discharge, or whether, even though Wilson so testified, he understood it was the cause of the sit-down.

At any rate, on March 19th, the morning after the start of the sit-down strike, Chief of Police Corlett discussed with respondent and A. F. of L. Affiliates matters relating to the sit-down and Wilson testified, "Chief Corlett came to us from Mr. Scott and stated that if we would agree to take back two employees who had been discharged—only one had been discharged but there were two mentioned in this particular transaction, who the second one was I don't know—if those people would be taken back without discrimination, the plant would open up, and we said that we have no objection, to refer the matter to the American Federation of Labor, who said they had no objection, and on that agreement the plant was evacuated."[4]

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[4] There is no competent testimony to support the Board's claim (Br. 17-18) as to reinstatement of employees, and employees "to have the right to join any union of their own free will." See Appendix pages 73 and 74, for discussions and references.

The next afternoon, A. F. of L. Affiliates served notice, and demanded that respondent close its plant (Tr. 272-3), and the plant was closed. The Board (Br. 18) admits this notice to close was a surprise to respondent, as up to that time, namely, late Saturday afternoon, March 20th, respondent had no notion other than that the plant would continue operations the following Monday.

The Saturday before the plant was reopened, the oral contract was supplemented to the extent that it became to all practical purposes, a closed-shop contract, in that old employees having joined unions were still required to maintain their membership, new employees were still required to join and the 38 employees not theretofore required to belong to the union were now required to join. The method of reopening the plant was considered, and as part of the mechanics, it was agreed that employees would be given clearance cards, and permitted to return to work, the issuance and furnishing of such cards being left entirely to A. F. of L. Affiliates, their decision being final. (Tr. 295 and 828.)

An office across from the entrance to the plant was opened by A. F. of L., from which clearance cards were issued during the first week. There was much confusion and naturally considerable difficulty in getting the plant into operation, with which condition respondent was much concerned, as were the employees. To bring about peace, and hasten full plant operation, the representatives of A. F. of L. Affiliates and C. I. O., without consulting respondent, had several meetings at the Hollenden Hotel with the Regional Director of the National Labor Relations Board, and as a result of those meetings, it was agreed that all employees would be cleared and could return to work. Respondent had no part in and attended none of those conferences (Tr. 328, 392, 459, 466, 486 and 541), and Behrse, one of the Board's witnesses, testified that as a result of the peace conferences, C. I. O. told their members

to go back to work and to join A. F. of L. (Tr. 576, Appendix, pages 92 and 93.)

In other words, the employees and quarreling unions had seemingly decided to quit fighting.

Respondent continued to bargain with A. F. of L. Affiliates, and after the plant reopened certain wage adjustments were made and horizontal wage increases given (Tr. 683-4), and on May 20, 1937, the third contract was entered into, which was a reduction to writing of the written and oral contract of 1936 as supplemented, and was a closed-shop agreement, rather than a closed-shop as to some employees and a maintenance of membership as to others. This contract was approved by the individual signatures of 964 out of 1030 employees, the approval being in the form *supra*, page 8.

From these facts, can it be fairly said that employees were denied the right of self organization, particularly when it is considered that the employees had been organized since prior to the adoption of the Wagner Act, and through a series of contracts made with the exclusive bargaining representative selected by an uncoerced majority, had been bargaining with respondent continuously? Neither did respondent's conduct in any way contribute to the selection or the powers of such representative.

When Paulus was advised of the sit-down strike, he went into the shop and told all the men to go home and return in the morning (Tr. 692), which instruction in itself would indicate that no one was then considered discharged, but a small group in disregard of Paulus' instruction continued the sit-down strike, apparently having made up their minds to strike regardless.

The Board contends that the respondent with no good cause closed its plant after March 19th, to coerce its employees, and that it was a lock-out, which statement does not accord with the facts. Due to one union attempting to sign up members of the other, and to usurp the position of

the other as exclusive bargaining representative, respondent was caught between the two factions and the quarrel was one in which it had no part and over which it could and did have no control. The closing was not due to any suggestion or desire on respondent's part, but was the result of a demand by the exclusive representative of respondent's employees, backed up by a refusal to work. Such a closing is in no sense a lock-out, nor did it evidence any hostility on the part of respondent towards C. I. O.

In reopening the plant, employees were not discriminated against because they chose to exercise their right of self organization. Clearance cards were available. As to the employees required by the contract to belong to the unions (new employees or old employees who were members in June of 1935, or had joined subsequently), if the union insisted that in order to return, these employees put themselves in good standing, it was no concern of respondent's, inasmuch as such requirements were included in the provisions of the 1936 contract, prior to its having been supplemented, and as to the 38 employees required by the supplement to become union members, that was a requirement for which the exclusive bargaining agent had the right to negotiate, and which, as has been pointed out earlier in this brief, the employees' representative had been seeking since 1935.

With respect to the employees' freedom of choice, consider the terms of the contract. It is true that prior to being supplemented on April 3rd, it was partly what was then known as preferential closed-shop, and partly what is now sometimes known as a maintenance of membership contract, but under the facts was this contract, insofar as it required membership or maintenance of membership as to certain employees, any different than a closed-shop as to those employees? The employees, through their own voluntary organization prior to the supplement of April 3rd, had restricted their freedom of choice to the extent that so far

as union affiliations were concerned, there was no freedom left to old employees that had joined unions and for new employees, and as to the few employees not required to be union members they, by continuing to work in the face of respondent's announcement that any employee was subject to discharge who did anything to disturb respondent's relations under its contract, were to that extent restricted. Finally that few employees, by the supplement, were bound by the closed-shop negotiated by their representative.

Since the A. F. of L. Affiliates undisputedly represented an uncoerced majority, a majority which had neither been obtained nor maintained by respondent's assistance, respondent had the right at the request of and with such representative, to supplement its contract and to later combine the written and supplemental oral contract of 1936 into the written contract providing for a closed-shop as to all employees. The Board's theory that any assistance whatsoever, regardless of its effect or relation to the majority, incapacitates a labor organization entering into a closed-shop contract, is manifestly contrary to the provisions and purposes of the Act.

The decision of the Court below in holding that such assistance as there may have been in the present case was valid, for the reason that it was rendered at the request of the then exclusive bargaining representative during the existence and in furtherance of a valid exclusive bargaining contract, and during the existence of individual powers of attorney signed by more than 90% of the respondent's employees, is right and its decree should be affirmed.

Congress, in passing the Act, was concerned primarily with seeing to it that collective bargaining representatives are freely chosen. Once that objective has been attained, the right of such representatives to bargain is not to be restricted, and employees are controlled and must abide by the judgment and action of that representative.

POINT III.

RESPONDENT DID NOT DISCRIMINATE AGAINST TWENTY-FOUR EMPLOYEES IN REGARD TO HIRE AND TENURE OF EMPLOYMENT, AND THE BOARD'S ORDER TO REINSTATE WITH BACK-PAY WAS PROPERLY SET ASIDE.

As has been shown, respondent had no union prejudice. It was willing to deal with any union, provided that union was the exclusive bargaining representative of its employees. Its prime consideration is to avoid involvement in the contest between C. I. O. and A. F. of L. Affiliates, and being penalized with a back-pay order, after having conducted itself in a manner it believed proper under its contract. The sit-down strike was not the result of any dispute with it, but was due to a quarrel between two unions, as was the closing of the plant.

Respondent is the innocent victim in this union controversy, and is forced to defend itself in a case in which its only interest should be the determination of whether or not its contract was valid, and with whom it might bargain.

If respondent's position is as urged under Points I and II, there is no question of reinstatement or back-pay. If, however, this Honorable Court should reverse the Court below, there then arises the matter of reinstatement and back-pay, and the correctness and extent of the order entered by the Board with respect thereto.

So far as reinstatement is concerned, respondent has never had any objection to taking back any employees, provided such reinstatement would not constitute a breach of its contract. In any event, since this matter is solely a dispute between unions, and being purely personal to the employees, the Board, under the circumstances, at the most should have provided for reinstatement only, and, even if back-pay was included, the order should not have applied to more than the three or four employees exempt from union membership under the terms of the contract as it was at the

time immediately following the readjustment of the sit-down strike.

Classifying the employees covered by the Board's order, it is admitted that nineteen were old employees and five new, and that of the old employees, sixteen were members of A. F. of L. Affiliates, and of the new employees, two were members, there being in all eighteen union members.

Considering first the old employees, these employees had, by their powers of attorney, designated the respective unions to represent them, and should not now be heard to object to a contract and its enforcement, upon terms agreed upon by their representatives.

The petitioner's argument that the so-called invalid closed shop contract of April 3, 1937, was the sole basis for imposing union membership does not follow from the facts. Nor is petitioner correct in stating that the Court's finding, that union members were obliged to stay members, was reached as the result of "an implied term" of the 1936 collective agreements. What the Court did say in addition to the reference to an "implied condition" was

> "Old employees of whom some 67 did not wish to join, should not be compelled to do so." (Tr. 868),

indicating thereby that those who did join would be by the contract required to remain members.

> "So far as the understanding of the parties illuminates the meaning of the obligation, it is that the men were bound for the period defined in the authorizations. There was no testimony to the contrary." (Tr. 871.)
>
> "In the instant case, it was reasonable that these men should agree to exempt from the requirement of union membership the older men whose unwillingness to join A. F. of L. was preventing the settlement of the strike initiated by Mechanics Educational Society, and the exemption in no way affects the legality of the agreement." (Tr. 872.)
>
> "The Board therefore erred as to its order finding respondent guilty of discrimination with reference to

18 of the 24 employees named in the order, because these 18 were members of A. F. of L. Affiliates, were bound by the contract until June, 1937 and were compelled to be in good union standing in order to continue in respondent's employ." (Tr. 873.)

The sixteen employees were nearly all polishers, and had been suspended or were under charges by their respective unions, and as such were unable to secure clearance cards, which situation was not chargeable to respondent, since under the contract, as unsupplemented, they were required to maintain their union status. Of the sixteen, Frederick Frank (not because of any threat, Tr. 340) having joined A. F. of L. Affiliates on March 18, 1937, might be considered a border-line case, and if his union status was questionable, there would be four in the so-called old employee immune class: Frank, Edward Koutnik, John Kearn and Nicholas Kozma. If, however, the April 3rd supplement provision was valid, then all, including these four, not qualifying under the closed-shop arrangement, were properly refused clearance cards and would have no claim.

Of the five new employees, two, as stated above, Pierret and Jewel Smith, had joined A. F. of L. Affiliates within two weeks after their term of employment began, and under the 1936 contract, as unsupplemented, these men, if unable to procure clearance cards by reason of suspension from their unions, or for any other union cause, would have no complaint. The remaining three, Washko, Mitchell and Rummel, being new employees, were required to be union members, and under the contract, whether before or after supplementing, would have no claim.

With respect to Rummel, one of the new employees, the Board ordered back-pay for him for the short period he was out of respondent's employ, he having returned and being employed at the time of the hearing before the examiner. In making its order, the Board awarded him back-pay in full, although for two weeks of the time in question he was in the hospital. (Tr. 666.)

The Board, as justifying its order, insists that as to the old employees, union or non-union, the 1936 contract did not apply, and that the supplement thereto was invalid; that the provisions of the 1936 contract as to the new employees, was secret and therefore not binding, and if binding, that it had been abandoned and the supplement was invalid. Respondent's position with respect to these contentions having been set out in Points I and II, a repetition here is unnecessary.

Respondent respectfully insists therefore that if the April 3rd supplement should be found to be invalid as contended for by the Board, there was no abandonment of the 1936 contract by respondent, which contract applied to certain old as well as new employees, and in such case there would be involved at most four men: Frederick Frank, John Kearn, Edward Koutnik and Nicholas Kozma. If the Court should find the 1936 contract was abandoned, and, in addition thereto, that, when the plant was reopened, A. F. of L. Affiliates was not the then exclusive representative of the employees, and that the powers of attorney outstanding as of that time did not maintain them as such, so that the complete closed-shop arrangement was improper, then, under the circumstances, it is respondent's contention that the most extreme order which the Board should have entered in any event was an order of reinstatement only. Any order involving the requirement of back-pay, when considered in the light of the facts in this case, would be penalizing the employer rather than effectuating the purposes of the Act.

POINT IV.

IN THE EVENT THE ORDER OF THE BOARD IS TO BE ENFORCED, IT SHOULD BE MODIFIED NOT ONLY IN THE RESPECT SUGGESTED UNDER POINT III, BUT RESPONDENT LIKEWISE SHOULD BE RELIEVED FROM ANY PAYMENT FOR A PORTION OF THE PERIOD PRIOR TO MARCH 16, 1939.

The hearing before the Examiner was begun June 10, 1937, and concluded June 18, 1937. (Tr. 153.) November 1, 1937, no intermediate report having been filed by the Examiner, the Board transferred the proceedings to Washington. (Tr. 47.) On July 7, 1938, some seven months after the proceedings had been transferred to Washington, and thirteen months after the conclusion of the hearing before the Examiner, the Board issued a final decision and order. (Tr. 48.) To this final order respondent, on July 16, 1938, excepted, on the ground that there had been no intermediate report filed by the Examiner prior to the final order, and that the issuing of the final order, having been delayed for thirteen months, due to no fault whatever on the part of respondent, the delay was prejudicial. (Tr. 75.)

The exception was overruled on August 23, 1938 (Tr. 79), and on February 2, 1939, respondent filed in the Circuit Court of Appeals its petition to review the Board's order, showing therein its exception to the thirteen months' delay, and the failure to file an intermediate report.

The Board, on April 11, 1939 (Tr. 82 and 220), vacated the final order entered July 7, 1938, and upon the Board's motion, on May 9, 1939, respondent's petition to review was dismissed by the Circuit Court of Appeals. (Tr. 223.) The reason given by the Board for the vacation of its order of July 7, 1938, was that no intermediate report had been filed by the Examiner, and that it desired to give the entire case further consideration (Tr. 222), in effect thus sustaining respondent's exception filed July 16, 1938.

On June 21, 1939, a proposed finding and order were issued (Tr. 83) to which proposed finding and order the respondent, on July 10, 1939, filed its exceptions, on the ground that the Board in failing to decide this case for thirteen months after trial and by delaying and preventing respondent's attempt to review the order by reopening the case and entering a proposed order substantially the same as the original order, had prejudiced respondent with respect to the sum it would be required to pay in back wages, if the order was sustained. (Tr. 144-5.) These exceptions were overruled in part by the Board in its order entered December 21, 1939, which is the Board's last order. By the terms of that order the Board gave some consideration to respondent's exception in that it suspended a part of the period to which the back pay order applied:

> "However, since we, on our motion, gave notice on March 16, 1939, of intention to vacate, and on April 11, 1939, vacated the decision and order issued by the Board on July 7, 1938, the respondent will be relieved from paying said employees back pay with respect to the period from March 16, 1939, to the date of our present order." (Tr. 209.)

The respondent refers the Court to the statement of the case made in the early part of this brief, page 3, in which the exceptions just referred to are set out in full, which may be more convenient for reference than to the transcript.

The Wagner Act recognizes the need for promptness in deciding labor controversies and that the courts, on petition to review, will consider and grant relief against the hardships imposed by unnecessary delay has been decided in the case of *National Labor Relations Board v. National Casket Company, Inc.*, 107 Fed. (2d) 992; C. C. A. 2:

> "Where complaint of National Labor Relations Board charging unfair labor practices involves grant-

ing of affirmative relief against employer, case should be prosecuted to conclusion with as much expedition as is reasonably practical, inasmuch as any unnecessary delay results in obvious hardship to employers. National Labor Relations Act, 29 U. S. C. A. § 151 *et seq.*"

The court saying at page 995:

"When a complaint involves the granting of affirmative relief against an employer, it is particularly desirable that the case be prosecuted to conclusion with as much expedition as is reasonably practicable, for any unnecessary delay results in obvious hardship to the employer, since the longer the delay the larger the sum he must pay as wages for work never performed, if the order requires reinstatement of employees with back pay. But the fact that there appears to have been unnecessary delay on the part of the Board in the case at bar has not been urged by the respondent as a factor to be considered by the court in passing upon the Board's petition for enforcement of its order, and we shall assume that any such delay is immaterial."

The delay in the cited case is similar to that in the instant case. Four years elapsed between the filing of charges and the hearing in the Circuit Court of Appeals.

In *National Labor Relations Board v. Suburban Lumber Co.*, 121 Fed. (2d) 829, C. C. A. 3, delay was complained of, but it related to enforcement and not proceedings before the Board and relief was denied, since the company had the right to appeal, if prejudiced.

Relief for delay was denied in *Triplex Screw Co. v. National Labor Relations Board*, 117 Fed. (2d) 858, C. C. A. 6, on the ground that the Act places no time on the Board for rendering decisions. The instant case, however, is concerned with a delay caused by the Board's carelessness, which the Board recognized, but, as respondent contends, insufficiently.

There was no excuse for the Board's delaying a decision in this case for thirteen months, nor for a final order being filed without an intermediate report. There is even less excuse for the Board, eight months later, vacating that order, on the ground that no intermediate report had been filed, when this omission had previously been called to its attention by respondent's exception.

If the order in this case is sustained with respect to back-pay, it should be suspended at least from the date of the exception to the Board's failure to file an intermediate report, July 16, 1938, instead of from March 16, 1939, and, in addition thereto, for a substantial portion of the thirteen months' period between the conclusion of the hearing before the Examiner and the entering of the first order.

The foregoing contention was urged in the Court below but in view of the decision there, was not passed on.

CONCLUSION.

Respondent had no labor trouble from June 1935 to March 1937, and since March has had no trouble. Its employees were organized, and, without any interference or coercion by respondent they had freely selected their bargaining representative, who held powers of attorney for all but 38 employees and who was recognized by respondent and entered into a contract. There is no controversy as to wages, hours or working conditions. C. I. O. attempted to organize respondent's plant in the face of an existing contract with A. F. of L. Affiliates, which contract had been entered into in June of 1936, and by its terms did not expire until June of 1937. The ensuing trouble was due entirely to the dispute between the two unions. Upon reopening the plant, there were the usual difficulties and delays incident to such union quarrels. Out of 950 or more former employees, all but 28 had returned to work by May 20, 1937, at which time 964 out of a total of 1032 persons

then employed had signed a new contract, in terms substantially the same as the 1936 contract, as supplemented to carry on for the short period remaining of the term of the 1936 contract and for the succeeding year. The National Labor Relations Act was not intended to persecute employers—and to enforce the Board's order in this case would be persecution.

The respondent has not denied its employees the right to organize, has not discriminated against them in regard to their hire and tenure of employment, and has conducted itself as provided by and in furtherance of its contract. Its present contract is valid under Section 8, subdivision 3 of the Act, and the decree of the Court below setting aside the Board's order should be affirmed.

Respectfully submitted,

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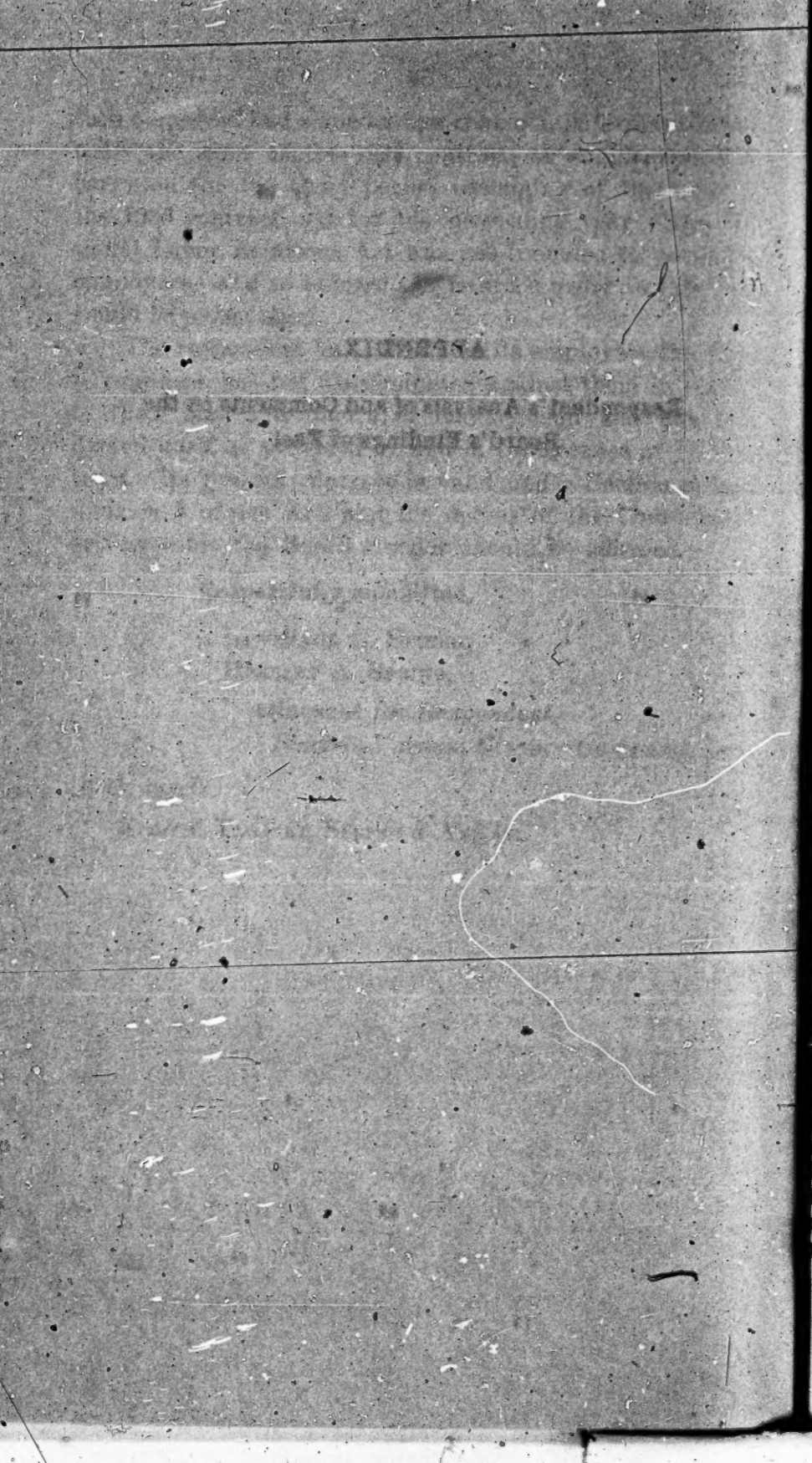
APPENDIX.

Respondent's Analysis of and Comments on the Board's Findings of Fact.



APPENDIX.

BOARD'S FINDINGS OF FACT.	RESPONDENT'S ANALYSIS AND COMMENTS
siness of Respondent. Tr. 156)	Admitted and not disputed.
rganizations Involved. Tr. 156-7)	Admitted and not disputed.
The unfair labor practices. ence, coercion, and restraint. respondent's labor relations March, 1937. Tr. 157-8-9-160)	The first four pages relate to matters prior to the first contract and have no relation to or bearing upon the case, there being no charge as to what occurred prior to June, 1935.
60) On June 22, 1935, immeafter membership cards for he then approximately 799 es were presented to the re and checked, the respondthe A. F. of L. Affiliates en- o a written contract for 1 hich provided for seniority, r day and a 40-hour week. t reopened on the following and the employees returned	The cards presented were in form of A. F. of L.'s Exhibit No. 2 **(Tr. 865)** and indicated the signer's membership in a craft union affiliated with A. F. of L., and authorized signer's union to represent him as his bargaining agent for one year. All respondent's employees, except one hundred ninety-one, at that time, were members of A. F. of L. Affiliates. **(Tr. 160.)**
course of the negotiations respondent, the A. F. of L. demanded a completely op agreement. The respondthe position that it would ir to its employees many of d been working there for require them to join an or-, but made the counter pro- all employees hired thereuld be required after a oation period of 2 weeks to embers of the appropriate . union. The counter pro- accepted but was not incorto the written agreement.	Wilson, vice-president of respondent, testified **(Tr. 263-4-5-291)** without contradiction, that the oral agreement was as is plead in respondent's answer **(Tr. 37)**, i.e. that any employee *not then* a member of a union would *not* be required to join, but would be permitted to continue his job without discrimination. New employees, however, would have to join A. F. of L. after two weeks employment. See also testimony of Paulus **(Tr. 688)**; Gordon **(Tr. 750-1)** and Muehlhoffer **(Tr. 811-12)**. The court below also found the contract to be as respondent claims. **(Tr. 868.)** At this time there were only 191 employees in this exempt class.

(Tr. 161) On July 6, 1936, the written agreement was renewed with one minor change in its provisions, to be effective as of June 24, 1936, and to run until June 23, 1937. The A. F. of L. Affiliates, who were again required to prove their majority, presented membership cards of 771 of the approximately 809 employees. Comparison of the July 1936 pay roll with the June 1935 pay roll shows that approximately 709 of those who had been employed June 22, 1935 (whom we will refer to as the old employees) were still employed, and that the other approximately 100 persons had been hired subsequent to June 22, 1935.

In negotiating the 1936 contract, the A. F. of L. Affiliates, whose membership now included all but approximately 38 of the respondent's employees, renewed their demand for a closed-shop contract but accepted instead an oral renewal of the previous agreement relating to new employees.

It is contended by the respondent that the oral agreements were not limited in their application to persons hired subsequently (whom we will refer to as the new employees). It is claimed that under the oral agreements, old employees who were members of the A. F. of L. Affiliates at the time they were entered into were required to remain members in good standing and that other old employees, though under no obligation to join the A. F. of L. Affiliates, were required upon becoming members to maintain such membership. It is further contended that the employees were notified of the terms of the oral agreements. We find none of these contentions sustained by the evidence. We are satisfied that the oral agreements related only to new em-

On this date there were only 38 employees out of a total of 809 who were not members of A. F. of L. Affiliates. **(Tr. 161.)**

On the Board's pay roll check showing 709 old employees and 100 new, that still does not change the fact that there were then only 38 employees who were not members of A. F. of L. Affiliates, as against 191 for the year previous, the exempt class being reduced accordingly.

The oral agreement was not limited to new employees, but applied also to old employees who were members of the union in June of 1935.

Any contention other than that made by respondent would be contrary to the evidence in that it clearly appears from the record that respondent's only objection to a closed shop was its unwillingness to force old employees, not then members of a union, to join a union. In 1935 there were only 191 out of 799 employees who were not A. F. of L., and in 1936 only 38 out of 809. Respondent demanded proof of membership and for the Board to find that respondent's contract did not contemplate an employee, once having joined a union continuing his union affiliation, especially after having demanded proof thereof and in the face of the year's power of attorney given to A. F. of L. by its members, is unwarranted even as an inference.

ployees, and that the employees were never notified of their existence.

Muehlhoffer and Ralph Gordon, business agents of the Machinists Union, the only representatives of the A. F. of L. Affiliates who testified to the 1935 negotiations, merely stated that a demand was made for a completely closed-shop contract, that it was rejected, that a proposal was then **(Tr. 162)** made that new employees be required to become members and that an agreement was reached upon the basis. Paulus, the respondent's superintendent, who stated that he was familiar with the June 1935 contract, testified that there was no requirement as to old employees, and, that the agreement simply was that "the new people coming in were to join the union."

On June 12, 1936, approximately a week before the expiration of the 1935 contract, the respondent's president, Julius Tuteur, wrote to the Director of the Board's Regional Office at Cleveland, with whom the respondent had had some conversations. The letter after reciting that respondent was operating under the 1935 contract and that a copy thereof was in the Director's possession, added, apparently thereby disclosing for the first time to the Director the existence of any further agreement, "We further wish to advise you, in confidence, that we said at the time we signed the written agreement with these unions, orally, that each new employee would be required to become a member of the A. F. of L. unions within 2 weeks after date of employment."

As to employees being notified of the oral agreement, this will be answered later.

See Muehlhoffer testimony. **(Tr. 811.)** Excepts only old employees not then members of A. F. of L.

See Gordon's testimony to the same effect. **(Tr. 750-1.)**

Both Muehlhoffer and Gordon testified not as the findings claim but that the old employees not members in 1935 were the only ones excepted from having to join A. F. of L. See also Wilson's testimony. **(Tr. 263-264-265, 291.)**

Paulus testified **(Tr. 688)** there was no requirement that employees in June 1935 had to join. A fair reading of his testimony does not say that having joined they were not required to remain members.

The Tuteur letter **(Tr. 741)** was offered to support the claim that an oral agreement existed. This letter was sent to the Regional Director at Cleveland at his request, and at a time during which there was no labor trouble. The second contract had not then been made. The Regional Director was not considering at that time any case against respondent, and the purpose for which he asked this information was not known to respondent. Respondent, however, not desiring that its contract with employees be given to the general public or communicated to others in the same industry, furnished the information in confidence, and this letter is not therefore subject to the inferences which the Board makes in Note 8 to its findings and in its brief, namely, that because

R. B. Wilson, who signed both the 1935 and 1936 contracts on behalf of the respondent testified with respect to the oral agreement that "from the time of our first entering into an agreement with the American Federation of Labor, it was understood with us that every employee, coming into our shop, would be required at the end of a 2-weeks' period to either join the Federation of Labor or leave."

Muehlhoffer, the only union representative who testified as to the negotiation of the 1936 contract, stated that, "In (Tr. 163) 1936, we again entered into an agreement that, as our relationship on a verbal basis had been satisfactory, we were willing to continue with the verbal agreement, or part of it, but it was insisted again that some of the employees in that plant must come into our organization." R. B. Wilson, however, testified that the oral agreement of 1935 was merely renewed in 1936 and that prior to 1937 the respondent did not know whether new employees had joined the A. F. of L. Affiliates.

That the oral agreements did not relate to old employees is further shown by the experience of Harold A. Keehl, one of the old employees who joined one of the A. F. of L. Affiliates in the early part of 1936. Later in the year, when he had fallen behind in his dues for 6 months, Keehl was called to the plant office where he was asked by R. W. Waterbury, respondent's accountant, why he had not paid his dues. Keehl answered that he was short of funds, and asked point-blank, "Do I have to belong to the Union as long as it is not a closed shop?" Waterbury, who though the respondent's accountant, actively handled the respondent's

the letter was given in confidence i
indicated that the oral agreemen
was a secret and was to be or wa
being kept from the knowledge of it
employees. Furthermore the infor
mation furnished was an accomm
dation to the Director and hence no
as carefully stated as it otherwis
might have been. Tuteur knew th
only old employees not required t
remain in unions were those who i
1935 or thereafter did not join will
ingly. (Tr. 811.)

See previous comments and refer
ences to testimony of Wilson, Gordo
and Muehlhoffer.

The Board here gives but a part o
the testimony of Muehlhoffer an
Wilson. Compare (Tr. 263-4-5 an
811-12).

No proof in the record that Wate
bury actively handled respondent
labor relations with Wilson an

abor relations along with R. B. Wilon and George R. Paulus, general uperintendent, answered, "Well, I lon't want to discuss that. We have n agreement and the only thing I an tell you, the best thing to do is o pay your dues." Waterbury did ot deny the conversation. Had here been any agreement that old mployees remain members in good tanding in the A. F. of L. Affiliates, t is reasonable to believe that Keehl ould have been told of its existence n this occasion.

The respondent in its brief subitted after the hearing places conderable reliance upon the testimony f R. B. Wilson that it was anounced on the reopening of the lant in 1935, and that employees ere thereafter notified by a notice sted on the bulletin board, that ey "would be considered as workg against the interests of the comany and as such subject to disarge" if they "did anything to sturb the peaceful and friendly retionship" between the respondent d the A. F. of L. Affiliates with hom it **(Tr. 164)** had just conacted. Irrespective of what the reondent might then or thereafter ve deemed "to disturb the peacele and friendly relationship" the reat did not bring the old emoyees within the terms of the oral reement. It did not even give noe to new employees of the existce of any agreement which reired that they become members of e A. F. of L. Affiliates.

To establish that employees were tified of the oral agreement, 11 neral employees were called as witsses by the intervenors. Harry nner, the only new employee ong the 11, testified, however, Paulus other than that he was present on some occasions when the men were talked to. Furthermore his answer was consistent, since Keehl being an old employee who was a union member, was expected to maintain his standing as such.

See Wilson's testimony **(Tr. 263-4-5 and 291)** and John Frame. **(Tr. 789.)**

The Board's witness, Lowrance **(Tr. 544)**, testified as to the announcement Wilson made to shop committee and others about new employees having to join and old employees not. Remember, however, at that time there were only 191 employees who were not members of A. F. of L.

Paulus **(Tr. 688)** testified his foremen were instructed to advise new men they were required to join the union, and at **(Tr. 700)** he corroborates Lowrance's testimony as to Wilson's announcement to the shop committees.

The court below found notice had been given and that such notice included the provision that any employees disturbing the contract relation with A. F. of L. were subject to discharge. **(Tr. 868.)**

Denner was a member of an A. F. of L. union before first contract and so testified. **(Tr. 796-7.)**

that though he was hired about July 11, 1935, nothing was ever said to him about any requirement that he join a union, and he did not become a member of the A. F. of L. Affiliates until April 1937.

Matt Denmore who had been president of M. E. S. A. local, testified he "knew" when he joined Machinists Union in August 15, 1935, that "new" men "were supposed to be in the union." M. C. Parks, who had been an active member of the M. E. S. A. shop committee, and who also joined the Machinists Union in August 1935, merely testified that there was such a "general understanding in the shop." Leonard Trask, who testified that he had participated in the 1935 negotiations, discredited himself by testifying that it was a closed-shop agreement whereby "all the employees in the plant . . . were to be members" and that it was so understood among the employees, and he also contradicted other old employees by stating that there were "no discussions" of the agreement. The testimony of the other seven old employees was substantially the same; none of them indicated a source of knowledge other than general plant gossip and rumors; two of them, W. E. Wilson, a polisher, and John Fox, an assistant foreman in the polishing department, "heard" or "understood" that the oral agreement required all employees to be members of the A. F. of L. Affiliates, though W. E. Wilson later modified his testimony to give an equally imaginative version of the agreement; that it was a closed-shop contract as to polishers but required only new employees in other jobs to become members of the A. F. of L. Affiliates.

See **(Tr. 799-800)**, optional as to old employees having to join.

Parks' testimony. **(Tr. 803.)** He was an old employee, knew joining was optional, but joined.

Trask on cross examination **(Tr. 783)** stated no employees were discharged for not being members of union—referred to old employees.

W. E. Wilson's testimony **(Tr. 786)** and John Fox's testimony **(Tr. 779)** should not be judged by quoted excerpts.

W. G. Wilson, John Frame, Hugh Dougherty, Henry Huffman and James Dobert were the other men making the eleven referred to by the Board. They knew that the contract applied to new employees and that old employees not members of the union did not have to join. **(Tr. 787; 789; 792; 794; 798.)**

(Tr. 165) Notice to employees of e terms of the oral agreement was ught also to be shown by the testi- ony of R. B. Wilson, Paulus, and rdon.

Wilson testified that each foreman d his own hiring and advised new nployees at the time of employment at they "would have to join the nerican Federation of Labor within weeks or would be discharged." aulus testified that in 1935 he in- ructed each foreman "to tell every an when he employed him, that he as required to join the Union with- 3 weeks from the time he started" d that he checked up on his fore- en "at almost regular intervals, king if they had followed those in- ructions." Gordon testified that in 35 it was "the understanding that remen would so advise new em- oyees." In 1937 Gordon again took arge of the affairs of the Machin- s Union at the respondent's plant. ecording to him, he did so in order bring to the respondent's atten- n the failure of recently hired em- oyees to become members of the achinists Union; secured permis- n for one representative of the achinists Union to talk to the men the plant; and had Toth, another siness representative of the Ma- inists Union, go through the plant th the shop committee for that pur- se. Gordon testified that on this asion the new men "doubted the tom" and "were called into the pondent's office with all the em- oyees so there could be a verifica- n of the established precedent," d that, when the new employees vertheless denied knowledge of the l agreement, they were contra- ted by the foremen.

See references on page 51, *supra*, and page 54, *infra*.

Unions at all times had permission to enter plant at any time. This was true from date of first contract in June 1935. **(Tr. 265.)**

We are satisfied, from the evidence introduced by the respondent and intervenors themselves, that prior to 1937 new employees were not notified of the oral agreement. The testimony that the foremen notified the new men of the agreement, or that they were instructed to do so cannot be reconciled with the fact that, as late as June 12, 1936, the respondent expressly stated in a letter that it wished the **(Tr. 166)** existence of the agreement to be kept secret. We are unable to accept Gordon's explanation of his version of why the new employees were called to the office or what then transpired. He testified that "the agreement was explained to them and invariably the fellows would say: 'Well, we are sorry we didn't know anything about it' "—yet when he was asked whether he was present, Gordon answered "I believe I was, yes." We also are unable to believe his statement that although the foremen had advised new employees, when they were hired, that the respondent had an agreement with the A. F. of L. Affiliates which required them to become members within 2 weeks, that although such notice was repeated by the business representative of the Machinists Union in the presence of a shop committee, workers remained so incredulous that it was necessary that there be a further "verification of the established custom," by confrontation by other employees and by foremen.

Finally, if the new employees had been notified of the oral agreement, it is not reasonable to expect that some of them would have been called as witnesses or that the foremen alleged to have notified them would have been called. Neither were called,

This conclusion is wholly an arbi
trary one and contrary to the evi
dence as referred to above. Notic
to employees of the oral contrac
and its terms is clearly shown b
previous transcript references, bu
we repeat again, see testimony o
Wilson **(Tr. 263-4-5, 290-1)**, Low
rance **(Tr. 544)**, Paulus **(Tr. 68
700)**, Gordon **(Tr. 750)**, W. E. Wi
son **(Tr. 785)**, W. G. Wilson **(T
787)**, John Frame **(Tr. 789)**, Hug
Dougherty **(Tr. 792)**, Henry Huf
man **(Tr. 794)**, James Dobert **(T
798)** and Muehlhoffer **(Tr. 811)**.

As to this letter see page 49, *supra*

As appears from above transcri
references the shop committees we
notified by respondent it was reall
duty of union to give notice a
their agents had access to the pla
at all times. However respondent
also had its foremen instruct ne
employees.

Referring to Board's note at bo
tom of **(Tr. 166)**, we know that
June 1936 there were 771 union me
bers who had signed cards givi
authority to A. F. of L. for one ye
to represent them as employees a
being union members, this likewi

though five new employees called witnesses by the Board had testid that they had not been given tice of the agreement.

) Interference, coercion, and restraint in March, April and May, 1937.

In March, 1937, employees workg in the machine shop were called to the respondent's office where ey were spoken to by Julius Tuur, R. B. Wilson, Paulus, Waterry, and the officials of the A. F. L.

(Tr. 167) We have referred to Gorn's testimony that new and old emyees were called into the office so t the new employees who denied owledge of the oral agreement ght be confronted by their foren, and so that the agreement ght be "explained" to all emyees. Toth, who according to Gorn rounded up the employees, did mention the alleged confrontans; nor for that matter did anyone e. Toth testified that, on these asions, Paulus merely told the ployees that the company had an reement whereby the new emyees were required to join the chinists Union but explained that employees need not. Moreover h admitted that he did not know ether the men to whom Paulus ke were new or old employees, that on one occasion, when seven were called in nothing was ed at the conference to indicate t there was a difference between and new employees.

Waterbury testified that old emyees were summoned to the office be sure they understood exactly contract." Like Toth, he ven-ed no explanation as to why this

meant as union members for that period.

Julius Tuteur did not attend the meeting. He merely happened to pass by the room and dropped in for a moment. **(Tr. 514.)**

No one denied the confrontations.

Paulus testified Machinists' Union was trying to get new men to join and asked his help. He called upon old employees to help him. **(Tr. 689.)** Reasonable to do this since practically all old employees must have then been members. Only 38 not members in June 1936.

Why was any explanation needed?

was thought necessary or desirable, was uncertain whether any new employees were called in, and professed to be unable to remember whether any of the employees signed union cards in the office.

Paulus testified that the groups called in were from the machine shop, and that they "were old men who had been there a long time, men I felt I knew very well." He stated that they were called in because the officials of the Machinists Union had asked for his "assistance" in signing up new employees. According to Paulus, he, Waterbury and Toth explained the contract to the old employees and asked them to aid in getting the new employees to join the Machinists Union. Paulus did not testify that any new employees were called to the office, admitted that on one vists to the office five of the employees signed cards, and also admitted that Edward Ramsey, an old employee, was discharged when he refused to sign. On that occasion, Paulus testified, there were present with him not only Toth and Gordon, business agents of the Machinists Union, but also Muehlhoffer, business agent of the Polishers Union, **(Tr. 168)** and Lenahan, Secretary of the Cleveland Federation of Labor, and that it was Lenahan who asked that Ramsey be discharged.

R. B. Wilson, who also admitted that Ramsey was discharged because of his refusal to join the Machinists Union, recalled that McKinnon, general organizer for the A. F. of L., was also present at the time. Wilson did not purport to explain why the men were called to the office, except to say that he warned them that "any employee of ours who did anything to disturb the friendly relation-

Paulus testimony. **(Tr. 689.)**

Ramsey was the only case in t whole record of any man bei threatened with discharge, or d charged for refusing to join A. F. L. Not a single witness testifi that anyone other than Ramsey w threatened with discharge for ref ing to join A. F. of L., and Rams was immediately reemployed and h been with respondent ever since th time.

No dispute about men being call to office to discuss joining unio Why would any explanation to th effect be required of Wilson? So t

lip existing between our company
nd the American Federation of
Labor would be considered as oper-
ting against the best interests and
ubject to dismissal." What this
arning was intended to mean to
mployees and what it undoubtedly
onveyed to them is to be gathered
rom a consideration of what was
appening in the machine shop
eanwhile.

Wilson admitted that about this
ime Muehlhoffer, business agent of
he Polishers Union, and Newman
nd Rhinehart, members of the pol-
hers committee, advised him "there
as some agitation in the machine
op," that he told them that they
ere "unduly alarmed" and that
e would proceed to investigate the
atter." Calling the employees to
e office was obviously Wilson's idea
an investigation. And the im-
rt of the conferences that followed
evident when it is noted that "the
itation in the machine shop" was
then an organized movement
ong the employees to sign up
mbers for United. Although al-
edly about a hundred new em-
yees had been hired in the ma-
ne shop since July, 1936, and not
ed the A. F. of L. Affiliates, that
iously was not the cause of oc-
rences of March, 1937. Indeed,
don's testimony that the Machin-
Union sought out the manage-
t at this time to obtain permis-
to solicit new members at their
k was transparently untrue in
of the fact that the A. F. of L.
iates had had that privilege
1935. **(Tr. 169.)** What was at
was the possible defection of
mployees to United. Otherwise,
xample, there is no way to ac-
t for the admitted presence of

as his warning was concerned, this had been published on buletin board and men were told nothing new. **(Tr. 291 and 685.)**

(Tr. 682.) No employees, as a result of Wilson's investigation, were threatened with discharge.

This inference is wholly unjustified and contrary to the evidence. Calling men in was Gordon's suggestion and Wilson had nothing to do with it. (Tr. 682, 689.)

The testimony as given in the findings is not correct. The 100 new employees were in the plant and not in the machine shop. **(Tr. 752.)** Gordon wanted to put three men in to organize and this the respondent would not agree to. He didn't seek permission to merely solicit members as the findings claim.

Clearly shows whole trouble was raid by C. I. O. on A. F. of L. plant.

Muehlhoffer, business agent of the Polishers Union, Lenahan, Secretary of the Cleveland Federation of Labor, and McKinnon, general organizer of the A. F. of L., in the office when employees from the machine shop were called in, and Lenahan's admitted role on those occasions.

This fear of United first manifested itself in the treatment of Edward Rericha, several days before the first group of employees were called to the office. Rericha, a member of the Polishers Union, had been employed by the respondent as a polisher for 11 years. On several occasions prior to March 11, he discussed the C. I. O. with other men in the plant and suggested that if they "would all belong together" (obviously referring to their belonging to one union rather than the several A. F. of L. organizations), "we would get better results." When Rericha came to work on March 11, he found his time card withdrawn and when he asked the reason was referred to Rhinehart, of the polishers committee, who sent him to Muehlhoffer. When he went to the Union's office he was accused of talking against the union and of being a member of the C. I. O. for the past 2 months. It appears that he was formally tried for delinquency in dues but, because of the protests of his fellow polishers, those charges, too, were dropped and he was told to return to work March 22.

About March 15 Theodore Vitosky, employed in the machine shop, objected to Toth's efforts to sign up a new employee who had not been promised a steady job, remarking, "It looks like a racket." Toth answered he "didn't have to take that" and obtained Vitosky's name from

This testimony was offered
objection, and is not competent.
625.) Rericha was suspended by
A. F. of L. union during week of
down.

Again shows trouble was due
tirely to C. I. O. attempting to
ganize A. F. of L. plant.

We call to the Court's atten
the fact that Vitosky's testim
(Tr. 304-309) was mostly admi
over respondent's objection to wh
exception was taken.

Vitosky had been a membe
A. F. of L. in 1935. He was
threatened with discharge w

he timekeper. The next day Vitosky and four other employees were ent to the office by Sam Wagner, eneral foreman of the machine shop. Of the five employees, Vitosky and t least one other, Elmer Lejinsky, ere old employees. In the office y found Paulus, Waterbury, (Tr. 70) Toth and some other persons hom Vitosky did not recognize. Before they left the office, Vitosky nd his companions had all signed nion cards. As we have pointed out he respondent offered no explanaion for this. We accept Vitosky's estimony that they signed because aulus asked them to and refused o allow them time to consider the atter.

On March 16 Paulus was seen in he machine shop, stopping at machine after machine, and signalling he representatives of the Machinists nion to come over. When Edward outnik, employed in that departent, came to work at 11 o'clock hat morning, several hours after the hift began, he found the shop in conusion and was approached by a numer of employees who told him that he "A. F. of L. organizers are down ere and they are trying to make verybody sign up." Later in the ay, Koutnik and Howard Lowrance, welder in the polishing department ho was a member of the United, greed that Lowrance would arrange r a meeting with a representative United and Koutnik would pass round word of the meeting. The xt afternoon, after work, Scott, a nited organizer, met with about 60 mployees. They signed cards and eceived others which they took into plant the next morning and beun to sign up other employees.

asked to resign a card, nor were the others with him, even though the requests were made on several occasions. (Tr. 316.)

Vitosky knew, and so testified, that new employees had to join after a probationary period of three weeks (Tr. 317), so that Toth's solicitation on Vitosky's own testimony was proper and according to contract.

This is not the testimony. See (Tr. 378-9), Koutnik says he saw Paulus go to a man working and motion to an organizer to come over. Testimony indefinite and part of it given over objection by respondent.

On the morning of March 17, Clyde H. Boyes, a sub-foreman, and himself an old employee, was sent to the office, together with six old employees in the automatic department of the machine shop. Boyes testified that McKinnon (general organizer for the A. F. of L.) and Toth, in the presence of Paulus, Julius Tuteur and four or five others whom he did not recognize tried to get them to sign cards but that after a dispute over initiation fees **(Tr. 171)** they returned to work without signing. About 2 o'clock that afternoon Boyes and some of the automatic men were recalled to the office. This time, Paulus said he thought they were intelligent men who would want to hold their jobs and could use their influence on the other employees. Boyes testified that Waterbury then told them "they wanted an answer soon" because the Polishers Union had threatened to strike if the employees in the machine shop did not sign up, and added that this would result in their being "out on the street." Waterbury denied making such a statement but neither he nor anyone else denied that this was the second time in one day that these employees had been called to the office. Nor was there any denial of Boyes' testimony that he and some of the same men were called in again on March 18. No one can believe that they were summoned the second and third time for the purpose of being informed as to the existence of the oral agreement. We find Boyes' testimony as to this and the previous visits convincing. On the third occasion Paulus, Wilson, Waterbury, Lenahan, McKinnon and several others were present. Lenahan asked the automatic men to sign a card and when

Boyes was not called to any meeting at which Julius Tuteur, respondent's president, was present. The testimony is that Mr. Tuteur happened to pass Paulus' office and dropped in for a moment. His only participation, after being told what the argument was about, was that he wanted the employees treated right. **(Tr. 514.)** We commend to the Court a reading of Boyes' testimony. **(Tr. 515, et seq.)**

See Waterbury testimony. **(Tr. 703-4.)**

Respondent does not claim that employees were called to the office merely to inform them about the oral agreement. Some employees were called in for this purpose, but in many instances, it was to discuss the securing of members for A. F. of L. from among new employees. **(Tr. 689.)**

No one was threatened or discharged **(Tr. 524)**, and for a rea

y walked out again without com-
ing Lenahan told Wilson "they
uld be discharged."

Waterbury's warning on the after-
n of March 17 of a strike by the
ishers Union followed only a few
rs after Muehlhoffer had pro-
ed a strike to the polish[illegible]s com-
tee because the men in the ma-
ne shop were "joining C. I. O."
rse, one of the committee, testi-
that when no decision was
hed Muehlhoffer took Rhinehart,
other two members of the com-
tee, to the office; that on their re-
n Newman, who was chairman of
committee, reported that they
proposed a strike to Wilson, but
the latter had said "it was not
essary, that it was nothing serious
ut it, but he was going to make
n join the American Federation
abor Union, and if they don't he
ld fire one or two so the rest of
n will join." Though hearsay,
testimony as to the threat being
le to Wilson is satisfactorily cor-
rated by Boyes' testimony as to
erbury's warning. **(Tr. 172.)**
son, we have noted, admitted the
by Muehlhoffer and the commit-
He denied, however, that a
ke was threatened or that he had
e the statement imputed to him.
denial is not persuasive. He ad-
ed warning those called to the
e that if they "did anything to
rb the friendly relationship
the A. F. of L. Affiliates they
uld be subject to dismissal," he
no explanation of why, after
visit by Muehlhoffer and the
nittee, Boyes and the other auto-
e men were twice recalled to the
, and he admitted that on March

understanding of what occurred at the several meetings of Boyes', and to show that nothing was done which was contrary to the contract, we refer the Court to **(Tr. 512-519).**

Waterbury denied this warning. **(Tr. 701-2.)** Board admits this denial above, but conveniently forgets it here.

The Board called neither Newman nor Rhinehart, the men Behrse claimed to be quoting.

This testimony, the Board, in its findings, admits to be hearsay, and it was objected to as such, and admitted by the examiner over the respondent's objection. **(Tr. 563-4-5.)**

Waterbury, however, as shown above denied this warning.

There is a specific denial by Wilson. **(Tr. 682.)** That this denial is not persuasive, as the Board claims, is contrary to the facts, and a fair reading of the transcript, and such a finding by the Board, shows a bias, as Wilson was never discredited as a witness. **(Tr. 681-5.)**

18 Ramsey was discharged for refusing to sign a card in the office.

Edward Ramsey, together with "Vargo" or "Lefty Fargo," Kiss and "a fellow from the Automatic room" (who seems to have been Louis Young) were sent to the office by Sam Wagner, the general foreman, about 2 o'clock in the afternoon of March 18. Ramsey, Vargo and Kiss were old employees (as was Young). In the office Lenahan acted as spokesman for a group which included Waterbury, Toth, Paulus, Gordon and Muehlhoffer. Ramsey testified that Lenahan said the A. F. of L. "had a contract with the firm and the boys would have to sign up," that all but Ramsey signed and returned to work; that Ramsey persisted in refusing to sign; that Lenahan then told him he was fired, whereupon, Ramsey went back to the machine shop. No one denied Ramsey's testimony as to what happened to him personally; on the contrary, both Wilson and Paulus admitted that this was what happened. Nor was there any direct denial made of Ramsey's testimony so far as it related to Vargo, Kiss, and the "fellow from the automatic room." We see no reason to doubt that portion of Ramsey's testimony and find the facts to be as stated by him. We are further impressed by the failure of the respondent or intervenor to call as a witness, as to **(Tr. 173)** what happened in the office, a single fellow employee named by Vitosky, Boyes and Ramsey, or for that matter, any other employee, old or new.

As we have pointed out Ramsey was told in the respondent's office by Lenahan in the presence of Paulus, the respondent's superintendent, that he was "fired." Lenahan also ordered him to "step out into the

We ask the Court to read the testimony of Ramsey, Paulus and Wilson as to what occurred and not to be influenced by the argument in the Board's findings, for it is an argument and not a statement of the facts. **(Tr. 524 et seq.-691-267.)**

It is true Ramsey was discharged, but respondent attempted to rectify the mistake promptly, but was prevented by Ramsey's refusal to return to the office and by the sit-down strike which had then occurred. **(Tr. 691.)**

Despite Ramsey's discharge, he was never out of work, is not an employee for whom any claim is here made for back pay, and is still working for respondent and the court below so held. **(Tr. 873.)**

er room." This Ramsey did, ted a few minutes in the next m—watching the other men sign and then returned to his depart- nt. Under the circumstances, the nce of Paulus, who was in charge iring and discharge, was reason- regarded by Ramsey as indicat- that Lenahan acted with the ac- escence and approval of the re- ndent. Nor may the incident be shed aside, as suggested by the F. of L. Affiliates at the oral ar- ent before the Board, on the nd that while Lenahan "had no t" to tell Ramsey that he was harged, Lenahan "was pulling a timate bluff." The record leaves doubt that Lenahan's purported rcise of authority on behalf of the ondent was coercive because it understood by Ramsey to be, the respondent knew it would be erstood to be, the action of the ondent. Moreover, it is unnec- ry to determine whether under ciples of agency Ramsey's dis- ge was effected instanter upon han's declaration. The conten- of the respondent that "it fairly ears that no one was discharged," t, in any event, supported by the rd. Paulus admitted that he sent Wagner, Ramsey's foreman, and him that Ramsey "was fired." her, Wilson flatly testified that sey was discharged by his fore- as the result of the request of A. F. of L.

e further contention is made the respondent, shortly after he the office, realized that Ramsey n old employee and should not, fore, have been discharged; that is at once sent for Ramsey to y him that he had not been dis- ed; but that Ramsey "refused

As a matter of fact, when Paulus told all employees, when the sit-down strike occurred "to go home and come back in the morning," that in itself was enough to revoke the so-called discharge. **(Tr. 692.)**

See Paulus testimony. **(Tr. 691.)**

to return to the office to be given 'his word." Meanwhile, the men in the machine shop on hearing of Ramsey's discharge sat down, Ramsey joining in the sit-down. According to the respondent Ramsey's refusal to **(Tr. 174)** return to the office is to be explained on the ground he was "excited and (not) interested enough to return to the office," and that the men in the machine shop persisted in the sit-down after Paulus had told them to go home and return in the morning, simply because they "had made up their minds to sit and this they proceeded to do arbitrarily, without justification and in violation of their agreement." The A. F. of L. Affiliates advance another explanation for Ramsey's refusal to return to the office, it being their contention that the strike had no relation to Ramsey's discharge, but was a deliberate step in the organizational campaign of the United. At the oral argument, the respondent and the A. F. of L. Affiliates, for the first time, advanced the further contention that the strikers committed acts of violence and wantonly destroyed the respondent's property. The respondent and the A. F. of L. Affiliates rely upon the facts thus asserted to explain and justify the conduct of the respondent following the termination of the sit-down on March 19. Further, the claim that the discharge of Ramsey was the result of an error and was sought to be corrected immediately, is urged to support the contention that the respondent had engaged in no unfair labor practices prior to the strike. We shall review the course of events immediately preceding the strike, and then consider the further contentions with respect to the cause of the strike and its conduct.

Most men didn't know why they struck. Vitosky. **(Tr. 318.)**

Respondent does not now, and never has made any claim by reason of any violence occurring during the strike. On its theory of this case, it is immaterial.

(Tr. 174, 175 and 176) Quotation
m respondent's brief filed before
trial examiner.

The three pages of the finding devoted to a quotation from respondent's brief before the trial examiner has no place in the finding.

(Tr. 176) It is to be noted that
ılus did not testify that he decided
recall Ramsey to the office because
ıad been discovered that Ramsey
s an old employee and, therefore,
. 177) not properly discharged.
reover, Paulus did not testify that
instructed Wagner to advise Ram-
that the reason for his recall to
office was to withdraw the dis-
rge. Indeed, it is apparent that
lus' testimony that it had been
ided to withdraw the discharge is
to be credited in view of his ad-
sion that, during his subsequent
t to the machine shop, he made no
ement either to Ramsey or the
r strikers that the discharge had
ı reconsidered.

It is rather unfair to try to discredit a witness as honest as Paulus is shown to be when he testified he did not remember patting Ramsey on the back and telling him to forget the discharge (Tr. 692) after Koutnik, one of the Board's witnesses, had testified to hearing Paulus make such a remark to Ramsey. (Tr. 385.)

he record clearly discloses that
ısey's discharge was not the re-
of any mistake. Not only is
e no evidence that it was, but it
matively appears that it was not.
ısey was not an employee on the
ler-line between old and new em-
ees. He had been in the respond-
s employ for over 7 years. It is
nceivable that Paulus and
erbury thought he was a new
loyee. Moreover, it clearly ap-
s from Paulus' testimony that he
under no misapprehension. He
itted that the men called in from
machine shop "were old men
had been there a long time, men
iew very well." Furthermore,
sky, who on March 16 had been
)elled to sign a card in the pres-
of Paulus and Waterbury, had
in the respondent's employ for
st 9 years; and Boyes, a sub-

Vitosky was a member of A. F. of L. (Tr. 316) as was Boyes (Tr. 513).

foreman who three times on March 17 and 18 had been solicited in the presence of Paulus and Waterbury to sign a card, and on the last occasion, shortly before Ramsey's discharge, had been threatened by Lenahan with discharge, had been in the respondent's employ for 12 years. It is patent that Ramsey was not recalled because of any discovery that he was an old employee but because his discharge had been immediately followed by a strike.

The record is clear, and we find, that beginning on March 16, the respondent set out to forestall the organization of its employees by the United, and to compel them to sign up in the A. F. of L. Affiliates. As we have pointed out above, prior to March 1936 employees were not advised of the existence of the oral agreement. The record fails to show the name of a single new employee among the persons called into the office on March 16, 17 and 18, **(Tr. 178)** and the circumstances set forth above lead us to conclude that the new employees were not called in, and quite understandably so. The concern of the respondent was not over the failure of some new employees to join the A. F. of L. Affiliates, but with the possibility of dissatisfaction by the approximately 630 old employees who constituted more than two-thirds of the 932 persons on the payroll, and none of whom were covered by the oral agreement and whose affiliation with the United would not only constitute that organization the representative of a majority of the employees but obviously would have swung, or at least have been most likely to turn, the new employees to the United. Faced with this situation the re-

Repetition and answered by comments above.

The same is true as to notice of the oral agreement.

Respondent did not suggest calling men in for conference—this was the union's idea. **(Tr. 689.)**

There is no evidence that respondent was concerned as Board infers. There were then outstanding powers of attorney from all but 38 men.

The record showing (except as to Ramsey) no threat of loss of employment for failure to join a union, does

spondent summoned the old employees to the office and there sought to, and in many instances was able to, coerce them into joining the A. F. of L. Affiliates. Its action was plainly an interference with the right guaranteed its employees by Section 7 of the Act.

Only by virtue of the proviso contained in Section 8 (3) of the Act was the respondent entitled prior to March 1937, to require new employees to join the A. F. of L. Affiliates. That right it then had because of the provisions of the agreement made in 1935, and renewed in 1936, when the A. F. of L. Affiliates represented a majority of the employees and had not been assisted by any unfair labor practice by respondent. However, the rights of old employees guaranteed by Section 7 of the Act were unaffected by the agreement. The agreement placed no limitation upon their right to become members of the United and to encourage other old employees to become members, or to decline to join, or to drop their membership in the A. F. of L. Affiliates, or to persuade other old employees to do so. Nor did the agreement inhibit old employees from urging such action upon new employees. Of course new employees who **(Tr. 179)** forsook or refused to join the A. F. of L. Affiliates after being advised of the oral agreement could be discharged pursuant thereto. But it does not follow that the respondent was entitled to interfere with the efforts of old employees to induce new employees to join the United or to change their affiliation from the A. F. of L. Affiliates. The agreement did not purport to give the respondent any such right. Moreover, the proviso does not permit imposition of

not support the Board's argument, and we ask the Court to note that the Board does not cite one single instance where an employee was threatened. Every witness asked the question disclaimed any threat.

Respondent's right to require new employees to join and old employees having joined to maintain their membership is considered in respondent's brief.

Board here concedes respondent had right to enforce oral agreement, as to new employees, although later in its findings it denies this right. If the oral agreement is as respondent contends, then it applied to old employees as well, except such as in 1935 were not members of the union and had not joined since then. There were only 38 such men.

the penalty in a case where no notice has been given of the existence of the agreement. The proviso in permitting the employer "to require membership" in a labor organization manifestly implies that the employee shall be advised that the employer's action is taken pursuant to an agreement. Otherwise employees would have no means of knowing whether they were being illegally discriminated against, or whether the employer was simply enforcing a valid obligation. The proviso was hardly intended to permit equivocal employer conduct, so likely to precipitate industrial conflict over what employees, in view of the employer's silence, quite reasonably conclude was an interference with rights guaranteed to them by Section 7 of the Act.

The respondent's conduct, manifestly illegal on March 16, 1937, did not become permissible action on March 17, because the A. F. of L. Affiliates threatened to strike unless the employees in the machine shop joined those organizations; the threat afforded no justification for the continuance of the flagrant interference with the rights of employees.

We have referred above to the contention of the respondent that the employees in the machine shop went on strike "arbitrarily" and "without justification" and to the contention of the A. F. of L. Affiliates that the strike was part of the plan of the United to organize the plant. The **(Tr. 180)** record, however, shows that the strike was the direct result of the respondent's illegal action, that it was decided upon only after the threat by Lenahan on March 18 to Boyes and the other automatic men that they "should be discharged" for refusing to join the

The Board again ignores, as it has throughout its findings, the membership cards and powers of attorney given by employees, and their effect on union affiliation.

There is no claim by respondent that any strike was threatened on March 16th. The threat was made on March 20th, after the sit-down strike was ended.

F. of L. Affiliates, and that it was ally precipitated by the discharge Ramsey. The record further es- blishes that the strike was a de- nsive measure and not an organi- tional tactic; that it was termi- ted at once upon the respondent reeing that the illegal conduct of e past few days would cease. inally, the record leaves no doubt at such violence and destruction of roperty as occurred, and there was ttle of either, is to be attributed to e A. F. of L. Affiliates.

As we have pointed out above, a roup of approximately 60 employees et with Scott, the United organizer, the afternoon of March 17, signed rds, and received others to be used soliciting members. There was no scussion of a strike, and the strike e next day was a complete sur- ise to Scott. The calling of a rike was first discussed by the men the machine shop after Boyes and e other automatic men reported e threat made by Lenahan in the esence of Paulus and Waterbury. hen Ramsey and his group were lled to the office the men in the achine shop agreed that they ould strike if any discharges fol- wed. The record is unclear only to whether the strike followed mediately after Ramsey returned om the office or whether confirma- on of the discharge through Wag- r intervened. That the strike was used by Ramsey's discharge is lain, and the contention to the con- ary is in the teeth of Wilson's ad- ission that the respondent knew it be the cause. Wilson testified that The reason was that an employee ater identified by him as Ramsey) d been discharged at quitting me, a few minutes before, and as a

This does not follow from the record, because Vitosky testified the men didn't know why they took part in the sit-down strike the 18th. **(Tr. 318.)** Even Vitosky didn't know why he did so.

demonstration about that the employees you have referred to (i.e. the employees in the machine shop) stayed over night."

The strike by the employees in the machine shop was **(Tr. 181)** not conducted as an organizational strike. No attempt was made to prevent the operation of the other departments. While employees in some of the other departments on hearing of the strike quit work, the shift ended shortly after the strike began, and employees in the other departments left the plant; the men on the next shift worked except in the machine shop. During the evening some of the strikers asked employees in the plating department to join in the strike. This led to a heated argument with Muehlhoffer, business agent of the Polishers Union, which included employees in the plating department, and Rhinehart, a member of the polishers committee. When the matter came to the attention of Koutnik, one of the leaders of the strike, Koutnik took the position that since the employees in the plating department were represented by the Polishers Union, and had been ordered to work by their representatives, the strikers should not seek to involve them in the strike; and the solicitation ceased at once. The strike remained limited to the machine shop, the employees in which were the persons who had been subjected to the respondent's illegal action. Indeed, there is no evidence that any employee in the machine shop wished to work but was prevented from doing so by the strike, although the pay rolls in evidence show that many of them were still employed by the respondent at the time of the hearing and therefore available as witnesses.

Respondent's plant is such that one department is shut down the balance of plant cannot run. (Tr. 275.) Furthermore, Keehl testified that other departments participated later in the strike. (Tr. 494.)

It is ridiculous for the Board to suggest that with half or even a part of a department engaging in a sit-down strike, the remainder could work.

he strike by the employees in the hine shop was clearly a defen- step, and the claim of the re- ndent that the men struck "arbi- rily, without justification and in ation of their agreement" is nifestly without merit. The actions the respondent which caused the ke was illegal, and was, more- r, action approved, and there can little doubt, instigated by the F. of L. Affiliates. The claim now le that the employees in the ma- ne shop had available and should e resorted to the procedure pro- d in the contract for settlement grievances by negotiations be- en the respondent and the A. F. L. Affiliates flouts common sense. Tr. 182) Whether the strike con- uted a trespass upon the respond- s property it is unnecessary to de, although we note that the re- ndent at no time ordered the men eave the plant. None of the strik- were denied reemployment by respondent because of their par- ation in the strike. Nor, as we l point out, are the respondent's ons subsequent to the termina- of the strike to be attributed eto. Apparently in an attempt stablish such a causal connection veen the strike and the respond- s actions after its termination, respondent and the A. F. of L. iates urged at the oral argument re the Board that the strike was ently conducted and involved the ton destruction of property by United. The contention has, as ave stated, no foundation in the rd. Neither the respondent nor A. F. of L. Affiliates called any esses to establish such acts on art of the strikers, nor sought to such evidence by cross exami-

It was a strike by some 60 employees who had the night before started to organize C. I. O. and some few others who signed cards the morning of the strike. **(Tr. 445.)**

Some men, as Vitosky testified above, didn't know why they struck —but the evidence is clear, regardless of the Board's finding, that the cause was to have C. I. O. organize against A. F. of L., and respondent was in the middle. *There was no dispute as to wages or other grievances.* **(Tr. 285.)**

Since no trespass is claimed, why burden the record with this purposeless argument and include it in a finding?

nation of the witnesses called by the Board. From the uncontradicted testimony it appears that the only violence occurred on the morning of March 19; that at that time McKinnon, general organizer of the A. F. of L., came into the machine shop and ordered the strikers to leave; that McKinnon immediately attempted to bring in 30 or 40 men, who obviously were not employees in the shop since the employees were already there on strike; that one of the 30 or 40 men sought smashed through the glass door with a blackjack, hardly an instrument carried by an employee; that the strikers prevented these men from entering the room; and that then the strikers were showered with bricks and other objects "from outside the factory." There is no evidence that McKinnon acted under any authority from the respondent, or that he made any such representation to the strikers. Such violence and property damage as occurred was, therefore plainly attributable to the A. F. of L. Affiliates. Indeed there is no evidence that the respondent, which had never ordered the men from the plant, deemed it necessary to invoke the protection of the police. **(Tr. 183.)** On the contrary the appeal to the police was made on behalf of the strikers.

On the morning of March 19, Scott, who had learned of the strike, went to the East Cleveland police station to invoke the assistance of Chief of Police Corlett. The latter had acted as an intermediary in 1935, and the first contract between the respondent and the A. F. of L. Affiliates had been signed in his office. Scott appealed to Corlett to intervene in the situation and at-

t to make "some kind of ar-
ement to get these men back
were discharged and a peaceful
ement." Corlett agreed to un-
ake a settlement, and later in
day advised Scott that he had
nunicated with the respondent,
suggested that Scott prepare an
ement which he would present
he respondent. An agreement
prepared, but Corlett returned
informed Scott that his proposal
not acceptable to the respond-
Scott then prepared the fol-
ng proposal:

I hereby authorize Chief of Po-
e Corlett to act with the Electric
cuum Company. We agree to
back to work with the reinstat-
g of the two men discharged
sterday, with the understanding
at the employees shall have the
ght to join any Union of their
n free will.
Under these terms we agree to
back to work peacefully.

WALTER E. SCOTT,
District Organizer.

ett returned to the plant with
revised proposal, telephoned
t who had remained at the po-
station, and informed him that
Wilson and Lenahan had
ed thereto, but that the men in
machine shop insisted upon
f that Scott had authorized the
ement. **(Tr. 184.)** At Corlett's
gestion, Scott came to the plant,
in the presence of Corlett and
lus addressed the strikers, and
ained that under the settlement
would return to work on Mon-
which was the next work day.
t made his statement about 2
ek in the afternoon, and the

We commend to the Court's read-
ing, Scott's testimony as to the
settlement he claims was arranged
by Corlett. All matters to which
he testified were hearsay, were ob-
jected to and admitted over respond-
ent's objection. **(Tr. 433-4.)** Corlett
was available. Wilson, at the time
he testified, could have had called to
his attention Scott's purported writ-
ten memorandum. Lenahan and
other witnesses were available.

The agreement was undoubtedly
as Wilson testified **(Tr. 268 and 281)**;
namely, that any discharged em-
ployees could return without preju-
dice. There was no agreement that
all employees would have the right
to join any union.

The reliance which the Board
places on this hearsay evidence, is of
course, prompted by its attempt to
sustain charges against respondent
by showing, if possible, a variation,
at this time, of respondent's con-
tract.

strikers immediately left the plant. Although the respondent urges that there is no "competent or substantial evidence to support a finding" that the respondent was a party to the settlement of the strike, or that it was adjusted with the understanding that "the employees shall have the right to join any Union of their own free will," Wilson testified as follows:

> Chief Corlett came to us from Mr. Scott and stated that if we would agree to take back two employees who had been discharged —one only had been discharged, but there were two mentioned in this particular transaction, who the second one was I don't know— if those people would be taken back without discrimination, the plant would open up, and we said that we have no objection, to refer the matter to the American Federation of Labor, who stated that they had no objection, and on that agreement the plant was evacuated.

It is apparent from Wilson's testimony that the respondent was a party to the settlement agreement, as were the A. F. of L. Affiliates. There is no suggestion in Wilson's testimony that the settlement was upon any other basis than that proposed by Scott, and reported to him by Corlett to have been concurred in by Wilson and Lenahan. Lenahan was not called as a witness. Wilson who was the first witness in the case, gave the testimony set forth above upon his first appearance on the stand. Later the testimony with respect to Corlett's reports, and the re-drafted proposal itself were added to the record. Subsequently Wilson was called as a witness by the re-

Wilson's version of the Corlet settlement is the only competent evi dence in the record in regard there to.

(Tr. 268.) The Board here co rectly quotes Wilson, and the Cou will note that his testimony is ver specific, that the right to return t work, without discrimination a plied only to one and possibly tw persons supposed, at that time, t have been discharged.

Wilson had given his version the settlement by Corlett. Why de

spondent and did not deny any part of Corlett's reports. That the reports accurately set forth the facts is fully corroborated by the circumstances above set forth, and particularly by the absence of any contradiction by Wilson or Lenahan, **(Tr. 155)** and by the fact that Corlett otherwise would hardly have requested Scott to come to the plant to reaffirm the final proposal. We find that the respondent agreed to the reinstatement of Ramsey and the resumption of work with the right of employees to join the union of their own choosing.

At the oral argument before the Board counsel for the A. F. of L. Affiliates urged that the termination of the strike was secured only because they sacrificed their rights under the oral agreement. As stated by counsel, "If the A. F. of L. had said 'No, we are going to stand on our rights and the new men must join' • • • there never would have been a termination of that sit-down." The contention rests upon mere assertion. The employees had no knowledge of the oral argument, and the conduct of the strikers indicates no disposition to disregard any rights of the A. F. of L. Affiliates in the premises. Indeed their conduct with respect to the employees in the plating department indicates the contrary. Moreover, there is no evidence that the respondent or the A. F. of L. Affiliates ever suggested that the strike be terminated under an arrangement whereby new employees would join the A. F. of L. Affiliates, and the reason for their failure to do so is explainable by the fact, to which we have adverted above, that they were concerned about the old and not the new em-

such purely hearsay testimony as Scott's! Respondent preferred to stand on its objection being sustained by the Court. *The Board here comments on Wilson's failure to deny testimony, and where he does deny it, as in the case of Boyes and Behrse, the Board finds his denial* **(Tr. 172)** *is not persuasive.* It is impossible to meet such arbitrariness on the part of the Board.

This paragraph is purely an argument and decides or finds nothing.

ployees. The contention now advanced for the first time is sheer speculation and has no support in the record. Indeed it is squarely in conflict with the equally untenable claim of the respondent that the strike settlement did not provide that employees might join the union of their own choice.

On March 20, the respondent inserted an advertisement in a newspaper tersely announcing the closing of the plant on March 22 "as a result of" a letter received from the (Tr. 186) Cleveland Federation of Labor and the A. F. of L. Affiliates. The letter, dated March 20, stated that, "As the bargaining agent for your employees we request you to temporarily close your plant, pending present negotiations with you relative to matters covered by our contract wtih you." No testimony was offered to explain the reference to "pending present negotiations"; and under the circumstances it must have been a reference to negotiations prior to March 20.

Wilson testified that when the plant was evacuated on the afternoon of March 19, the respondent expected to resume operation on its next regular workday, Monday, March 22, and that the first intimation that he had that there was any question about it was a conference in the "late afternoon" on Saturday, March 20, at the office of the respondent's attorney, at which he, Tuteur, the respondent's president, and seven or eight A. F. of L. officials were present. The conference, Wilson testified, followed the receipt of the letter dated March 20. But this fails to account for either the reference in the letter to "pending present negotiations," or the publi-

Letter was not published Mar
20th, but on Sunday, the 21st. T
reference to the 20th is an error.
all other testimony as to the n
refers to Sunday, the 21st. (Tr.
449 and 477.) Furthermore,
Plain Dealer is a morning paper
a letter received the 20th could
have appeared until the follow
day. Petitioner has stipulated
correction, which disposes of the
taken conclusion as to the dat
the conference.

n of the letter in a newspaper
Iarch 20. The conference must
occurred not later than March
This is borne out by Wilson's
mony as to what occurred at
onference.

ilson testified that he, Julius
ur, Muehlhoffer and six or seven
representatives of the A. F. of
ere present at the conference
hat the A. F. of L. representa-
"asked us to close our plant
they might go over the situa-
and get their lines in order."
n testified that he did not
what led to the request "other
very obviously there was a
within the plant that was
ng the dissension (sic) within
nks," that though the respond-
id not consider "there was any
proportion" of dissenters, they
w there was a group that was
, as reported to us at least, to
lyte members of another or-
ation with whom we had a con-
" At the conference, accord-
Wilson, the A. F. of L. officials
it was an acute situation in
ant and we must close Monday
ng or they would not appear
ork Monday morning." What
F. of L. proposed to do after
utdown, Wilson testified, was
87) not discussed. The A. F.
Affiliates urge, however, that
demanded the closing of the
because of the strike, which,
have stated above, they claim
n organizational tactic of the
and, therefore, likely to re-
As we have already pointed out
is no proof that such was the
e of the strike, or that the
of L. Affiliates so regard
ntention that the strike was
son for the demand that the

See Wilson's testimony. (Tr. 255-6.) Also (Tr. 273) respondent was notified on the 20th to close its plant or A. F. of L. would strike.

plant be shut down is equally without support in the record. None of the representatives of the A. F. of L. Affiliates called as witnesses testified as to the negotiations with the respondent with respect to the shutting of its plant, nor did Wilson testify that any such reason was assigned. The reason for the demand by the A. F. of L. Affiliates is plain, and was communicated to the respondent. The A. F. of L. Affiliates were concerned, and demanded a shut-down, simply because "there was a group that was trying • • • to proselyte members" of the A. F. of L. Affiliates and the A. F. of L. Affiliates were determined to prevent further proselyting.

The threat of a strike was not made by the A. F. of L. for the first time after the sit-down. It had been made as early as March 17 because the men in the machine shop were "joining the C. I. O." and now was renewed for the same reason. We have stated above that the original threat furnished no justification for the respondent's action in coercing its employees to join the A. F. of L. Affiliates. The repetition of the threat did not justify it in shutting the plant in order to prevent its employees from exercising their right to self-organization.

In its brief the respondent in seeking to justify the shut-down urged that:

> Respondent had no choice in the matter, • • • because American Federation of Labor, under its contract, was the bargaining agent for its employees. • • •

The contract with the A. F. of L. Affiliates afforded no basis for interfering with the right of its old em-

This threat of a strike the respondent denies. **(Tr. 682.)** Also pure hearsay and this is the Board's second reference to it. **(Tr. 564.)** The evidence fails to support any such inference as the Board makes.

The respondent was fully justified in relying upon its contract with A. F. of L. Affiliates. This contract (the

yees, who constituted a large ma-
ity of all of its employees, to
m, join or assist a labor organiza-
n of their own choosing. (Tr. 188.)
e contract no more entitled the
pondent to shut down the plant
order to prevent these employees
m "joining the C. I. O." than it
used the respondent's prior ac-
n in coercing them to join the
F. of L. Affiliates.
The notice of the shut-down was,
ler the circumstances that pre-
ed its publication, tantamount to
statement that the respondent,
in at the instance of the A. F. of
Affiliates, was taking action to
vent the organization of the
ited. The publication of the no-
e was itself, therefore, an inter-
ence with the rights of its em-
yees under the Act, and the shut-
vn was a lock-out to restrain the
rcise of those rights.
About 4 o'clock in the afternoon
March 19 a meeting of the United
s held in the Post Office building
East Cleveland, at which a large
nber of employees attended. Offi-
s were elected and apparently it
s voted to apply for a charter; an
plication for a charter was re-
ved by the national organization
out March 21, and a charter issued
out April 1. The membership
ds in A. F. of L. Affiliates, which
employees had signed in July
6, provided that the employee
reby designated the appropriate
F. of L. Affiliate as representa-
e for collective bargaining, and
ther provided that:

The full power and authority to
ct for the undersigned as de-
cribed herein supersedes any

second one) was in full force and effect in March of 1937. It had been freely negotiated at a time when all but 38 of respondent's employees were members of A. F. of L. There is no charge by the Board, and no evidence, that at the time this contract was made A. F. of L. Affiliates were assisted by the respondent, nor that the powers of attorney designating A. F. of L. as bargaining agents for a period of one year, were obtained or maintained through any assistance on the part of respondent.

An inference and not a finding, and wholly unwarranted by the evidence.

Application for charter was not made until April 1, 1937, Board's Exhibit 27. (Tr. 863.)

power or authority heretofore given to any person or organization to represent me and shall remain in full force and effect for one year from date and thereafter, subject to thirty (30) days written notice of my desire to withdraw such power and authority to act for me in the matters referred to herein.

(Tr. 180) On March 28 a meeting of the United was held, again attended by a large number of persons, for the purpose of securing formal resignations from the A. F. of L. Affiliates, which might be presented in a body. On Friday, April 2, 1937, United mailed a letter to the respondent stating that a majority of the respondent's employees had resigned from the A. F. of L. Affiliates and were members of United; that United represented the majority "as to settlement of grievances arising under the existing contract," and were ready to return to work under its terms; and that all grievances arising under the contract which affected members of United would thereafter be handled by the United committee signing the letter. Wilson testified that because the office was closed over the week end, the letter was not received until Monday, April 5, a few minutes after the plant had reopened under arrangement with the A. F. of L. Affiliates. Wilson did nothing about the letter other than to send it to counsel for the respondent.

We are satisfied that the arrangement under which the plant was reopened on April 5 was exactly set forth in a notice published by the respondent in the newspapers on April 3 and 4, 1937, directed to the respondent's employees. The notice

Evidence is undisputed that nothing was ever done to complete resignations, and no notices of resignation were ever given A. F. of L. Affiliates or to respondent.

Letter never followed up by resignations and third contract was signed later and still no resignations, or attempt to cancel powers of attorney given A. F. of L. to represent employees. In fact, such powers were renewed on signing of third contract in May, 1937.

The peace conferences held between C. I. O. and A. F. of L. show that any idea of A. F. of L. resignations was dropped. (Tr. 394.)

For other references to peace conferences see pages 92 and 93, *infra*.

ed that on July 6, 1936, the re-
ndent, at the employees' request,
entered into a contract with the
F. of L. Affiliates recognizing
n as the employees' duly chosen
nts for collective bargaining;
, thereafter, until June 23, 1937,
vas agreed that the respondent
loy only persons affiliated with
A. F. of L. Affiliates; and that,
r conferences with the em-
ees' agents, it was at their re-
st resuming operations April 5,
, but only those employees who
e members of the crafts under
tract with the respondent would
mployed. Attempt was made to
lain by the testimony of Wilson,
don, Toth and Muehlhoffer that
ad been agreed between the re-
ndent and the A. F. of L. Affili-
on April 3, before the notice
published, that old employees
e not to be required to show
they were in good standing with
A. F. of L. Affiliates in order
Tr. 190) return to work; that in
no such requirement was im-
ed except by the Polishers Union;
that even as to employees within
jurisdiction of the Polishers
on respondent was ignorant of
deviation from the terms of the
ement. We are entirely unable
redit this testimony.
Vilson admitted that he had re-
d to allow two employees to re-
to work on April 5 because they
not have clearance cards from
A. F. of L. Affiliates, that he
w of other similar cases, and
the agreement was that the
. of L. Affiliates should have the
decision as to who would re-
e a card. Muehlhoffer summed
he agreement made on April 3 as
iding that "all the people who

The arrangement claimed by respondent is clearly established by the testimony of Wilson **(Tr. 295)**, Gordon **(Tr. 757)**, Toth **(Tr. 737)**, Muehlhoffer **(Tr. 813-820-834)**.

Here again the Board, to justify its findings, discredits testimony offered for respondent.

In the Board's Note 39, it misdescribed the clearance card which is C. I. O.'s Exhibit 7. **(Tr. 864.)** *It does not contain an authorization for representation.*

go back in there to work the following Monday would carry a card issued by the respective organization." He also testified that "The entire responsibility of who was to go back in was turned over to the A. F. of L. Union." Wilson described the agreement in almost the same words. Muehlhoffer also admitted that even before the plant was reopened the Polishers Union had decided that their members who had become officers or committeemen in United would not be given clearance cards.

Muehlhoffer, Gordon and Toth testified that all of the A. F. of L. Affiliates, except the Polishers Union, gave a clearance card to all who applied, but none of them specifically denied the testimony of witnesses called by the Board who told in detail of cards being refused them, testimony which unlike the general statements by Muehlhoffer, Gordon, and Toth, is quite convincing.

Muehlhoffer testified that the respondent was not advised that some employees were refused cards. But it is clear, even from Wilson's own testimony, that the respondent expected the cards would be refused to some. Wilson admitted that simultaneously with the reopening of the plant on April 5 the respondent began hiring persons it had never previously employed, although no additional **(Tr. 191)** employees were needed for normal operations. Furthermore, if the respondent had not expected the A. F. of L. Affiliates to refuse cards to some employees, Wilson would hardly have "left word at the outside office that I was in no position to discuss matters with any individual and (such individuals)

See also Muehlhoffer's testim
(Tr. 834-5.)

Here again in the face of t
mony by unimpeached witnesse
respondent, the Board arbitr
holds the evidence unconvincing

There is no question but that
18 men, mostly polishers, were
fused cards by Muehlhoffer or
shop committee, but they were
pended members of the Polis
Union, and under its contract
respondent had no part in such
pute, and its refusal to clear the
without a card, in such case,
proper.

should go through the routine channels." Moreover, it was established by uncontradicted testimony that Julius Tuteur, the respondent's president, in the presence of Paulus and Wilson, as well as Frank Ledasil, representative of the Federal Union, was advised by Mitchell France, an old employee and a member of the union, that he had been refused admittance to the plant on April 9 on the ground tht he had no card; and that Tuteur himself had stated that France would have to obtain a card. Similarly it was shown that William H. Fogarty and Frederick Frank, old employees, told Paulus of their unsuccessful efforts to obtain a card, only to be advised that a card was essential.

The A. F. of L. Affiliates which had again conferred with the respondent during the week of March 21, circulated to their members on March 31, the following notice:

To employees of Electric Vacuum Company:

Representatives of A. F. of L. organizations having a working agreement with the Electric Vacuum Company have endeavored to clear up the situation that resulted in the closing of the plant. Conferences have been held with representatives of the Company and it is now our opinion that the real solution to the problem is proper enforcement of the present agreement, and that no one be allowed to resume work unless affiliated with these organizations.

We are interested in having the plant reopen Monday April 5th and in order to get a definite expression from the membership a Special meeting will be held,

No proof whatever that respondent knew of or had to do with this notice nor did it attend the meeting.

Friday April 2nd at 2 P. M.
1000 Walnut Ave.,

(Tr. 192) We urge all members to attend this meeting so operations may be resumed Monday morning.

The meeting was held on April 2 and the employees present voted to return to work on April 5. Gordon testified that

> we called a general meeting for the membership and again the matter was broached that if they had stuck to strictly closed shop, we wouldn't have had any trouble at all because fourten or fifteen people out there started this rumpus and the group was disgusted for their interference and losing them, and we were definitely instructed to tell the management that the group was going to work under strictly closed shop conditions, and most of the conferences were on that subject.

Gordon further testified that at a conference with the respondent on the following day,

> we asked the management that the group wanted a strictly closed shop, and after them discussing the matter a while, it was agreed to let the matter lay for a while until after we got under operations and then we could go to work and get the closed shop through as to the wishes of the body.

Gordon was not a credible witness. We have referred above to his account of the conferences with the machine shop employees in the respondent's offices on March 16, 17 and 18. His version of the meeting of April 2 and the conference of April 3 is equally implausible. If

Gordon's testimony. **(Tr. 754-75**

Again the Board, because G
don's testimony is contrary to
theory, arbitrarily discredits him,
it has Wilson and other witne
for respondent. We ask the Co

the A. F. of L. Affiliates had consulted "the wishes of the body" on April 2, there would have been no occasion for deferring the demand for a closed shop until the sentiment of the members was ascertained. Moreover, Toth, Gordon's associate, admitted that the notice, published by the respondent on April 3, had been prepared and agreed upon prior to the conference held that morning. Furthermore, the notice of the meeting issued by the A. F. of L. Affiliates on March 31, and the notice of reopening of the plant published by the (Tr. 193) respondent on April 3 contained exactly the same misrepresentation as to the agreement between the respondent and the A. F. of L. Affiliates. Both misrepresented that the contract entered into in 1936 provided for a closed shop. Nor may the misrepresentations be regarded as "inadvertent." Admittedly the respondent's notice was not published until approved at the conference on April 3 at the office of counsel for the respondent; and it was on its face a carefully worded statement. We have no doubt, and we find, that both notices were part and parcel of a single plan devised and executed by the respondent and the A. F. of L. Affiliates to liquidate the United activities among the respondent's employees, and to do so without risking the reaction that might follow upon an announcement that the respondent and the A. F. of L. Affiliates had decided to do so by entering into and enforcing a closed-shop agreement.

The notice published by the respondent unquestionably misrepresented to the employees the terms of the oral agreement of 1936, and the misrepresentation was obviously a

to bear in mind that in this case no intermediate report was filed by an examiner, so the Board, in its attitude toward witnesses, did not have the benefit of the opinion of anyone who heard and saw these witnesses on the stand. Furthermore, in many instances the Board, when it suits its purpose, depends on the testimony of these witnesses.

deliberate attempt to give the semblance of legality to the respondent's conduct immediately prior to the shut-down, to justify the shut-down itself, and to conceal the fact that the closed-shop agreement set forth in the notice was of recent and consequently tainted origin. There hardly could have been devised a stratagem more calculated to aid the A. F. of L. Affiliates to retain and regard their members, and to cut the ground from under the employees who had sought to organize a United Group. Not only did the notice present an ultimatum, the respondent thereby also concealed from its employees that what was involved was their legally protected right to make a choice of representatives without thereby risking discharge.

In substance, though not in form, the arrangement effected between the respondent and the A. F. of L. Affiliates on or about April 3, 1937, was an abandonment of the oral agreement as insufficient to meet the exigencies of the (Tr. 194) situation and its replacement by a closed-shop agreement. This, the A. F. of L. Affiliates conceded at the oral argument before the Board, was the case. They contended, however, that such an agreement was entirely valid. The contention, however, was rested upon a number of claims which we have found without merit. Thus it is the position of the A. F. of L. Affiliates that prior to April 3, the respondent had engaged in no unfair labor practices, except the allegedly accidental discharge of Ramsey; that the respondent had been subjected to a sit-down strike called as an organizational tactic by the

The Board's position as to the notice is inconsistent. First it is found to be misleading and a false statement, and then to indicate an abandonment of the original contract. If false that is one thing, but if an abandonment of the original contract and correctly states the then existing arrangement, it was not false or misleading.

ited and conducted by it with vio-
ce and destruction of property;
t while the United was legally en-
ed to solicit members of the A. F.
L. Affiliates it had indicated a
n to cause defections by violent
l unlawful means. Upon this
w of the facts, the A. F. of L.
liates contend further that they
re authorized to enter into the
sed-shop agreement since they
l been designated as collective
gaining representatives by a ma-
ity of employees in July 1936 by
nbership cards which stated that
h designation was for a period
l year, "and thereafter subject to
rty (30) days notice of desire to
hdraw," and it is urged such des-
ation must be presumed to have
tinued in effect until April 1937
he absence of proof of notice of
hdrawal. As we have pointed out
ve the afore-mentioned conten-
s with respect to the actions of
respondent and the United are
irely at variance with the facts.
re is, consequently, not here pre-
ted the question whether during
term of a contract between a
or organization and an employer
within the period for which the
or organization had been desig-
ed as collective bargaining repre-
tative by a majority of em-
yees, a supplementary closed-shop
eement may validly be made to
vent defections from such labor
anization. The situation here
sented is one where during the
e preceding the making of such
upplementary agreement the re-
ndent at the instance of the A. F.
. Affiliates, had flagrantly inter-
d with, coerced, and restrained
employees in their right to join
assist the United, and had co-

This part of the finding is argumentative, and based on a wrong premise. A. F. of L. represented a clear majority of respondent's employees at the time the 1936 contract was negotiated. There was no taint or charge of coercion in the making of this contract. It was in full force and effect in April of 1937, and until the third contract was made, and respondent was therefore justified in contracting anew, or if you please, modifying or supplementing its contract with A. F. of L., in full reliance upon the fact that A. F. of L. was bargaining agent for employees. This is further supported by the powers of attorney which were unrevoked.

erced them to affiliate with the A. F. of L. Affiliates. By (Tr. 195) reason of such unfair labor practices by the respondent immediately antecedent to the supplementary closed-shop agreement, the new agreement was unquestionably illegal and void, and its publication and application constituted interference with the rights of its employees under the Act.

In fact, the arrangement of April 3, 1937, was merely another act of the same character as the previous interference, restraint, and coercion, and differed only in the irrelevant element of formality. The Act does not, however, permit illegality to become transmuted into legality by the embodiment of unfair labor practices in an agreement. That device affords neither an estoppel nor a franchise. Section 8 (3) of the Act carefully negatives such a possibility by excluding from permissible agreements imposing union membership as a condition of employment, an agreement entered into between employers and labor organizations which have been established, maintained, or assisted by unfair labor practices. And here there had been such assistance, persistent and solicited, if not demanded, by the A. F. of L. Affiliates.

The contention that the A. F. of L. Affiliates must be presumed to have represented a majority of the respondent's employees on April 3, is obviously beside the point. Section 8 (3) of the Act precludes the execution of a closed-shop with a labor organization established, maintained or assisted by unfair labor practices, irrespective of whether it has or has not been designated as collective bargaining agent by a majority of the employees. Accordingly it is un-

For answer to this argument se
respondent's brief.

There can, in view of the way th
powers of attorney were given A. F
of L. by the majority of respondent'
employees, be no claim that A. F. o
L., in securing such powers, was a
sisted by respondent.

This argument is just as specio
as the one above.

necessary to determine whether in the absence of the respondent's unfair labor practices, the A. F. of L. Affiliates would be presumed to have continued to be, on April 3, the bargaining agent designated by a majority of the respondent's employees. Moreover, having solicited the unfair labor practices which effectively impaired, if they did not completely destroy, the possibility of free choice of their bargaining agent by the respondent's employees, the A. F. of L. Affiliates, like the respondent, are in no position to invoke a rule of presumption which has for its purpose the determination of whether at a particular time a labor **(Tr. 196)** organization remains the freely designated representative of employees.

By May 20, 1937, the respondent had filled all the jobs that existed on March 22 and had increased its working force to approximately 1100 employees. According to the payrolls, approximately 583 of that number were employees who had been with the respondent prior to June 1935, when the first oral agreement was made. As we have stated, employees who resumed their jobs after April 5, 1937, had been required to obtain clearance cards. Gordon testified that on May 20, 1937, there were no old employees who were not members of the A. F. of L. Affiliates and that substantially all other employees had joined.

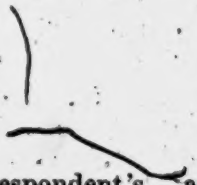
On May 20, 1937, a new agreement was entered into between A. F. of L. Affiliates providing for recognition of the A. F. of L. Affiliates as the bargaining agents for all of the respondent's employees, and for a completely closed shop. This agreement, which by its terms ran for 1 year, and thereafter from year to

year unless notice of termination was given 30 days before the end of the annual period, was individually approved by the large majority of the employees at a meeting of the A. F. of L. Affiliates held for that special purpose before the contract was executed. But what we have said with respect to the agreement of April 3, 1937, is entirely applicable to the contract of May 20, 1937. In the intervening period the respondent had merely continued its unfair labor practices under the guise of performance of a closed-shop agreement which had no validity. Manifestly under such circumstances the majority of the A. F. of L. Affiliates and the purported referendum are irrelevant.

We find that by the various activities set forth above, the respondent, during the period beginning in March 1937 and continuing through May 20, 1937, aided in the organizational activities of the A. F. of L. Affiliates and hindered and impeded the organizational activities of United, and has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

(Tr. 197) B. The discriminations as to tenure of employment.

The complaint alleges that the respondent, on or about April 5, 1937, and at all times thereafter, failed and refused to recall 28 employees. No evidence was offered with respect to four of those named, Frank Erzen, Austin Ballard, Frank Hunck and William Krall. As to them the complaint will therefore be dismissed without prejudice. As to each of the remaining 24 the allegations of the complaint are sustained.



Respondent's answer to Board's argument here is the s as above stated.

All that respondent did was in reliance that A. F. of L. represen its employees, and it was entitled rely on the powers of attorney gi by the employees to a union, wh in securing them was not maintai or assisted by respondent. All acts the Board is complaining ab occurred during the life of the ond contract.

The findings as to discriminat are considered in detail in respo ent's main brief.

Nineteen of the twenty-four employees as to whom we hold discrimination proven were old employees. In their case it is, of course, unnecessary to review the evidence as to the various occasions when they were refused employment because they had not obtained clearance cards, or when they were refused clearance cards, or when, after they had obtained clearance cards, they were refused employment allegedly because their jobs meanwhile had been filled by persons hired for the first time on or after April 5, 1937. We have pointed out in Section III A (2) above that these employees were never affected by the oral agreements, and that the agreement of April 3, 1937, furnished no justification for requiring them to be members in good standing of the A. F. of L. Affiliates as a condition of returning to work. We have also pointed out in Section III A (2) above that pursuant to the latter agreement employment was given only to those who complied with that **(Tr. 198)** condition and that the places of those who did not were filled by persons hired to replace them.

The only employees were not required to go through the meaningless gesture of asking to be taken back without a clearance card; and they were within their rights in not applying for a clearance card. The refusal of employment to them was in fact immediate upon the reopening of the plant, and because the respondent never withdrew the conditions improperly imposed, the refusal was a continuing one.

Obviously there is no merit in the contention made by the respondent in its brief that in such a case an

Of these nineteen, all but one was a member of A. F. of L. prior to the sit-down strike. Nearly all eighteen union men belonged to the polishers, and had been suspended by their union.

They were, therefore, not in the exempt class created by the oral agreement, and if required to continue in their union respondent did not have to take them back without a union card.

On April 3rd the contract was a closed shop, and in such case, they were also disqualified.

employer may plead as a defense that an employee tardily applied for reemployment under the illegal condition and was rejected because his place had been meanwhile filled by one never employed before. From and after April 5, 1937, these employees were in the same position as any employee avowedly discharged because of his union activities. That thereafter such an employee obtains reemployment by accepting conditions which the employer had no right to impose merely ends the direct consequence of loss of wages and requires only that that circumstance be taken into account in determining the remedy for the unfair labor practice.

We accordingly find that respondent has at all times failed and refused to recall to employment the following persons employed by respondent when the plant was shut down on March 22, 1937: William Behrse, Steve Dragosa, William H. Fogarty, Mitchell France, Frederick Frank, John Kern, Edward Koutnik, Ncholas Kozma, Arthur Kruse, Howard Lowrance, Joseph Macho, John Masters, Alfred Meissner, George Onda, Edward Rericha, Mike Smith, Arthur Troyan, and Theodore Vitosky. We also find that respondent failed and refused to recall to **(Tr. 199)** employment, except for the period from April 26, 1937, until May 10, 1937, Harold Keehl, employed by respondent when the plant was shut down on March 22, 1937.

Keehl's reemployment during this brief period seems quite accidental. He obtained a clearance card on April 9, 1937, returned to work on April 14, was notified by his foreman that he would have to secure the approval of Ledasil of

As is shown in the main br
of respondent, these men either
fused to return when they agreed,
were not entitled to return.

The Board has failed to give a
consideration to a compromise ma
between C. I. O. and A. F. of L. as
men returning, which agreement w
made independently of respondent
and through the office of, and at t
instance of, the Board's Regional D
rector at Cleveland. By this
rangement A. F. of L. consented
approve any employees then retu
ing to work, but most of them stay
out the balance of the week.

he Federal Union; he did not do so, but returned to the plant on April 26 and worked until May 10 when his foreman told him that there was a notice for him to see Ledasil and pay up his dues in order to hold his job. When he was unable to do so at once, Ledasil refused to accept any postponement in payment and said he would be notified when he might present his case to the Union, but he never received such notice. We are satisfied that Keehl's brief period of reemployment was merely a temporary oversight on the part of the respondent and presents nothing essentially different from the other cases.

As stated above, we find the charge of discrimination also sustained with respect to five new employees. What has been said by us as to the status of old employees on and after April 5, 1937, is no less applicable to them. True, prior to April 5, 1937, they might, after notice of the oral argument, have been refused employment unless they became or remained members in good standing in the A. F. of L. Affiliates. True also, where a valid agreement is replaced by an invalid one, the earlier agreement may retain its vitality for its original term. But we have found that on April 3, 1937, not only was a new agreement made but the earlier oral agreement was mutually abandoned by the respondent and the A. F. of L. Affiliates as useless for their purposes, because of the rise of the United, and the fact that the majority of the respondent's employees were subject thereunder to no restraint against their becoming members of United and terminating their membership in the A. F. of L. Affiliates.

327-8-9, 392-3-4-5, 459, 466, 478, 486, 498, 541, 602, 638.) (Behrse at 576.)

Moreover, we find that the oral agreement is irrelevant to the issue of discrimination since its existence was never brought to the notice of the new employees. The only notice they were given was of the agreement of April 3, **(Tr. 200)** 1937, an agreement which they were entitled to disregard. Certainly it cannot be said they were somehow to divine from such a notice the existence of an antecedent valid oral agreement relating to new employees only. We have pointed out in Section III A (2) above that an employer may not even, pursuant to a valid agreement, threaten an employee with discharge for failure to join a labor organization unless the employee is advised of the existence of the agreement. We see no reason to distinguish the case where the employer shuts down its plant and on reopening, without giving notice of the existence of an agreement, requires membership in a labor organization as a condition for returning to work.

Accordingly we find that the new employees were within their rights in not applying for a clearance card, that by virtue of the notices published on April 3 and 4, 1937, they were refused employment on the reopening of the plant and that the refusal was a continuing one. We accordingly find that the respondent has at all times failed and refused to recall to employment Leo Pierret, Jewell Smith, and Joseph Washko, employed by the respondent when the plant was shut down on March 22, 1937; and has failed and refused to recall to employment until May 19 and 24, 1937, respectively, James Mitchell and Rudolph Rummell, employed by the respondent when the plant was shut down on March 22,

We have previously shown there was notice of the oral a ment. See comment on finding pages 51 and 54, *supra*.

1937, and who have since May 19 and 24, 1937, respectively, been given employment by the respondent at their former jobs.

On the basis of the foregoing, we find that the respondent, in refusing and failing to recall the aforesaid persons to employment except upon condition that they secure approval of the A. F. of L. Affiliates, has discriminated against said employees with respect to hire and tenure of employment in order to discourage membership in the United and encourage membership in the A. F. of L. Affiliates, and has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act.

(Tr. 201) The respondent contends that it is, or should be absolved of the charge of discrimination by reason of an agreement made on April 7, 1937, between the United and the A. F. of L. Affiliates whereby the latter agreed to issue clearance cards to all employees who became members. Though disclaiming any part in this agreement, the respondent claims the benefit thereof but urges that it is not chargeable with the immediate breach thereof by the A. F. of L. Affiliates, of which we find it had knowledge. Even if the agreement had been one to which the respondent were a party, or had been one which it had thereafter in some manner adopted, it is clear that the agreement would not affect the power of the United to file, and of the Board to accept, the charges in the present proceedings, or lead the Board, as a matter of discretion, to withhold action on the respondent's unfair labor practices. The Board

See reference on pages 92 and 93. Board secured agreement between C. I. O. and A. F. of L. which serves further to show this whole difficulty was a fight for organization between two unions in which the respondent should not be concerned, and the Board through its Regional Director tried to make peace. Respondent took no part in these peace conferences.

was not a party to the agreement. Hence it is clear that, since Section 10 (a) of the Act makes exclusive the power of the Board to prevent persons from engaging in unfair labor practices affecting commerce, even an agreement binding a labor organization not to file charges of unfair labor practices with the Board, would not be binding upon the Board or in any manner affect the validity of charges filed with the Board. The agreement in the instant case, moreover, did not purport to be, and was in no sense an agreement by the United not to file charges with the Board; on the contrary, it was no more than an attempt to secure employment for those of its adherents who were willing to comply with a condition which we have found was unlawfully imposed by the respondent. Indeed, the respondent, having misrepresented the facts with respect to the closed-shop agreement and thereby concealed its illegality, is hardly in a position to urge any argument of estoppel. Furthermore, the agreement of April 7 having been breached by refusals of the A. F of L. Affiliates to issue clearance cards, the agreement affords no reason why the Board should not act upon the charges **(Tr. 202)** filed by the United. Finally, in the instant case, to give to the agreement of April 7 the effect now urged by the respondent, would be to sanction the continuance of the respondent's unfair labor practices, since, as we have pointed out above, the closed-shop agreements of April 3 and May 20, 1937, were merely the embodiment and formalization thereof. It is

lear, therefore, that an order should ssue that such unfair labor prac- ices shall cease.

The remaining portion of the findings refers to wages earned by various mployees up to the date of the hearing before the examiner, and unless there s now found discrimination against the employees, this part of the finding eeds no comment, but is covered in respondent's main brief. Furthermore, f discrimination is found, the compensation to be paid would be a matter to e worked out with the Board, and it is unnecessary to burden this Court ith such presently irrelevant matters.